Supreme Court, U. S.
FILED
FEB 26 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

January Term, 1979
No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare,
Petitioner

v.

TOWN COURT NURSING CENTER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
I. Opinions Below	1
II. Jurisdiction	1
III. Question Presented	2
IV. Statement of the Case	3
V. Reasons for Granting the Writ:	
A. There is division among the Circuits	7
B. The decision of the lower Court is erroneous	11
Conclusion	14
APPENDIX:	
Complaint	1a
Motions for Temporary Restraining Order and Preliminary Injunction	8a
Order Dated July 21, 1977	15a
Defendant's Motion To Dismiss	17a
Motion To Dismiss	19a
Plaintiffs' Motion for Extension and Renewal of Preliminary Injunction	20a
Order Dated September 15, 1977	23a
Opinion	24a
Dissenting Opinion	60a
Order Amending Opinion	66a
Order Dated December 18, 1978	68a
Order Dated January 25, 1979	69a

TABLE OF CITATIONS

CASES:

Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975) 4, 5

Caton Ridge Nursing Home v. Califano, 447 F. Supp. 1222 (D. Md. 1978) 11

Cook v. Bates, No. 78 Civ. 3600 (S.D. N.Y., Oct. 6, 1978), Medicare and Medicaid (CCH) ¶29,410 10

Klein v. Califano, 586 F.2d 250 (3d Cir. 1978) 6, 11

Moore v. Johnson, 582 F.2d 1228 (9th Cir. 1978) 7, 8, 9

Skehan v. Board of Trustees, Nos. 77-2311/12, slip op. at 22 (3d Cir., Dec. 21, 1978) .. 14

Town Court v. Beal, 586 F.2d 282 (3d Cir. 1978) 4, 5, 6, 9 10, 11,13

Town Court v. Beal, 586 F.2d 266 (3d Cir. 1978) 5

STATUTORY PROVISIONS:

38 U.S.C.A.:

§620 9
§620(b) 8
§642(a) 8

42 U.S.C.A.:

§1395 et seq. 3,9
§1395(a) 9
§1395f(a) 12
§1395x(j) 8

42 U.S.C.A.:

§1396 et seq. 3, 9
§1396(a) (23) 9, 11
§1396a(a) (28) 12
§1396i(a) (2) 8

ADMINISTRATIVE REGULATIONS:

42 C.F.R. §449 .....12, 13

45 C.F.R. §205.10(a) (5) 12, 13

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Fifth Amendment 7
Fourteenth Amendment 5

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Helen B. O'Bannon, Secretary of Public Welfare for the Commonwealth of Pennsylvania, petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on September 29, 1978.

I. OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 586 F.2d 280 and are set out in the appendix at 24a, 60a. The District Court's order is set out at 23a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1978. Petitioners were granted successive requests for enlargement of time within which to prepare and file this petition to and including February 26, 1979, 68a, 69a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

III. QUESTION PRESENTED

This petition raises the question of whether or not patients of a particular nursing home have a property interest in the determination by the Secretary of Public Welfare that the home was unqualified to participate in Pennsylvania's Medical Assistance Program. A divided Court of Appeals *en banc* decided that federal law has created such an interest and therefore concluded that before a nursing home provider may be terminated as a provider of services under Title XVIII and XIX of the Social Security Act the residents of that facility must be provided some form of hearing. Thus, the following question is presented:

Whether the Due Process Clause requires that individuals who reside in a nursing home and receive services pursuant to Title XIX of the Social Security Act must be given notice and an opportunity for a hearing before that nursing home may be terminated as a qualified provider of services under that Act.

IV. STATEMENT OF THE CASE

On January 1, 1967, Respondent Town Court Nursing Home was certified as an eligible provider of skilled nursing home services under both Title XVIII (Medicare) and XIX (Medicaid) of the Social Security Act.[1] In 1974 substantial deficiencies were noted in the annual surveys of the Town Court facility. A subsequent series of state and federal surveys and administrative proceedings culminated in the decertification of the facility as a Medicare provider by the Secretary of Health, Education and Welfare, effective June 18, 1977. Similarly, and based entirely upon this federal action, the Petitioner notified Town Court that its participation in the Medicaid Program would terminate on that same date.[2] Town

[1] 42 U.S.C. §1395 *et. seq.* (Medicare) and 42 U.S.C. §1396 *et. seq.* (Medicaid). Generally see the Social Security Amendments of 1972, Pub. L. No. 92-603, §246, 249A; 86 Stat. 1329 which provides for a uniform system of certification of facilities under Medicare and Medicaid. That Act provides that the actual survey of the facility is to be conducted, at least in the first instance, by the state's health agency. In Pennsylvania that function is performed by the Department of Health.

[2] Although the administration of the Title XIX programs have largely been left to the states, the 1972 amendments to the Social Security Act have consolidated the ultimate authority for approving a nursing home as a provider of services with the Secretary of HEW. Nevertheless, a provider such as Town Court, that participates in both programs, must receive its threshold approval as a Title XIX provider

Court then commenced administrative proceedings within HEW. After the submission of documentation in support of Town Court's request for reconsideration, the initial termination decision was affirmed.[3]

Instead of pursuing administrative remedies, the Respondent initiated these proceedings in the Eastern District of Pennsylvania on July 20, 1977. Town Court, on its own behalf sought to enjoin its termination as an eligible participant in both the Medicare and Medicaid Programs. The thrust of the complaint was that it violated procedural due process to terminate Town Court's eligibility without first providing it a full evidentiary hearing administratively and the right to seek judicial review. The District Court disagreed and refused to grant Town Court the injunctive relief that it had sought. On appeal[4] the Court of Appeals for the Third Circut affirmed the District Court in this respect, concluding that:

> in light of the extensive procedural safeguards already provided to facilities such as Town Court we believe it clear that any interest Town Court might have in continued certification under the Medicare program[5] is adequately protected by existing procedures.

Town Court v. Beal, 586 F.2d 266, 278 (3d Cir. 1978).

Although that determination was correct[6] and has not been challenged, six residents of Town Court had also joined in its complaint, contending that Town Court's termination unconstitutionally violated *their* right to the procedural safeguards of the Fourteenth Amendment.[7] Specifically, they argued that they were entitled to a hearing before it was determined that the Town Court facility was not eligible to participate in the Medicare and Medicaid programs. They contended that they would suffer a "de facto" loss of Medicaid benefits and therefore a substantial property interest without a prior hearing. 28a; *Town Court v. Beal, supra* at 285. In a separate opinion vacating the district court order denying their request for injunctive relief, the Court of Appeals held that:

> '[b]ecause a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Med-

from the state. That certification must, however, be terminated if the Secretary of HEW determines that such a program is not eligible to participate in Title XVIII as a Medicare provider. See *Case v. Weinberger,* 523 F.2d 602, 609-10 (2d Cir. 1975). This is, of course, precisely what happened in this case.

[3] 28a. *Town Court v. Beal,* 586 F.2d 282 (3d Cir. 1978).

[4] In fact the appeal was taken by Town Court from the District Court's refusal to extend its preliminary injunction (23a).

[5] As noted previously, Town Court was certified as an eligible provider under both Medicare and Medicaid and was challenging its termination of eligibility to participate in both programs. *Town Court v. Beal, supra* at 282.

[6] See e.g. *Case v. Weinberger,* 523 F.2d 602 (2d Cir. 1975).

[7] These patients attempted to sue on behalf of a class of similarly situated residents of skilled nursing home providers 27a That class was never certified but, the respondents are currently still receiving Medicaid benefits and in fact remain at the Town Court facility. 28a; *Town Court, supra* at 282.

icaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.'

29a; *Town Court v. Beal, supra* at 282-3, quoting *Klein v. Califano,* 586 F.2d 250, 258 (3d Cir. 1978). The Court of Appeals, however, never prescribed the constitutional prerequisites of such a hearing—leaving that to the District Court on remand. 29a; *Town Court v. Beal, supra* at 283. However, this threshold finding of a property interest is erroneous and final, and because Petitioner presently does not provide the residents of these facilities *any* opportunity for a hearing, review of this decision is presently sought in this Court.

V. REASONS FOR GRANTING THE WRIT

A. There Is Division Among the Circuits

The decision of the Third Circuit in this case is in direct conflict with decisions in similar cases in another circuit and district courts. In *Moore v. Johnson,* 582 F.2d 1228 (9th Cir. 1978), the Administrator of the Veteran's Administration had determined that certain patients of veteran's administration hospitals were receiving care in facilities that did not meet the statutory requirements. Accordingly, these patients were notified that they would be relocated to alternative qualified facilities. *Moore v. Johnson, supra* at 1230. As in this case, the patients objected, claiming that the Administrator's action violated their rights to procedural due process under the Fifth Amendment.[8] Specifically, the residents claimed a constitutional right to a pre-relocation hearing and a declaration that any relocation without such a hearing violated the Fifth Amendment. *Id.* at 1232.

The District Court dismissed the complaint, and concluded that with respect to the due process claims, the residents had no property interest in continued domiciliary care at a particular Veteran's Administra-

[8] Although their complaint apparently raised various other contentions, both the District Court and the Court of Appeals felt constrained to resolve the case on the basis of their due process claim. *Moore v. Johnson, supra* at 1232.

tion facility. *Id.* at 1231. On appeal, a panel of the Court of Appeals for the Ninth Circuit unanimously concluded that the district court was correct. Specifically, the court concluded that:

> to the extent that they believed that the administrator *must* furnish domiciliary care and vocational training benefits *to them* at *specific facilities in Los Angeles* their expectations . . . are mere 'unilateral expectations'. As such, they are not property interests. (Emphasis in original.)

Id. at 1233-4.

The approach and result reached in *Moore* are in direct conflict with the decision below. Although *Moore* concerned veteran's programs and this case concerns medicare and medicaid programs, both involve the central question of whether or not the actual recipients of these health care benefits are constitutionally entitled to participate in the governmental decertification of providers of these services. In fact the programs in both cases are essentially the same: persons deemed eligible for the services are statutorily entitled to receive such services *only* in facilities which have been approved for that purpose, by the Secretary in the case of Medicare and Medicaid, or the Administrator in the case of veterans benefits.[9]

[9] Compare: 38 U.S.C.A. §620(b) and §642(a) (Veterans Administrator is authorized to inspect and approve or disapprove nursing homes for participation in the program); and 42 U.S.C.A. §1395x (j) (Secretary of HEW may prescribe the standards for participating in the Medicare and Medicaid as a skilled nursing home). See also 42 U.S.C.A. §1396i (a)(2) (certification by the Secretary under Title XVIII (§1395a *et seq.*) shall be deemed as certification of that facility to participate under Title XIX (§1396a *et seq.*)). Under Titles XVIII and XIX, eligible recipients are permitted to choose freely among facilities which have been deemed to qualify for participation in the program. 42 U.S.C.A. §§1395a and 1396a(a)(23). The patient's right to choose among qualified providers of Veteran's nursing home benefits is less clear. *E.g.*, 38 U.S.C.A. §620.

Similarly, when a facility no longer meets the standards established by their respective agencies for participation in the program, then funds may not be expended in that facility under either program.

In both *Moore* and *Town Court,* the responsible governmental agencies determined that the respective providers of residential care were no longer qualified to participate in the program. Similarly, in both cases the residents who were generally eligible for benefits under the programs and were receiving services in these particular facilities asserted a constitutional right to be heard on that determination.[10] In decisions spanned by a single day[11], the Ninth and

[10] In *Moore*, the plaintiffs sought to directly challenge the right of the Administrator to order their transfer to a qualified facility. In *Town Court*, the residents premised their right to participate in the decertification process on their contention that decertification of the facility would necessarily result in their transfer to another facility. However, in both cases they were directly seeking to intervene in the decertification decision making.

[11] *Moore* was decided on September 28, 1979 and *Town Court* was decided one day later, on September 29, 1979. Moreover, the district court's decision in *Moore* does not appear to have been reported; thus, it is understandable that the Third Circuit did not specifically address the reasoning advanced in *Moore*.

Third Circuits issued diametrically opposed rulings—the Ninth Circuit finding that no property interest of the patients was involved and the Third Circuit finding just the opposite.

In similar contrast to the Third Circuit's approach in *Town Court* is the decision rendered in *Caton Ridge Nu. ing Home v. Califano,* 447 F. Supp. 1222 (D. Md. 1978), appeal pending, No. 78-1290 (4th Cir. May 15, 1978). In *Caton Ridge,* the nursing home corporation and a former patient[12] of that nursing home sought to enjoin both the state and federal agencies from decertifying that facility as a medicaid provider of skilled nursing home services. Like the respondents in this case, the patient in *Caton Ridge* claimed a due process right to a hearing before the nursing home could be decertified. The district court correctly concluded, however, that "the termination of Caton Ridge's status and the subsequent transfer of [the plaintiff] on 30 days notice with no opportunity for a hearing did not infringe on her rights". *Cation Ridge, supra* at 1225. Similarly, in *Cook v. Bates,* No. 78 Civ. 3600 (S.D. N.Y., Oct. 6, 1978), reported in Medicare and Medicaid Guide (CCH) ¶29,410, the Court found that Medicaid patients had no due process right to contest the termination of payments to the facility at which they were receiving psychiatric services.

[12] The only named plaintiff, Ethel Grabill was not a resident of that facility when the action was commenced, having been transferred to a qualified facility as a result of the decertification of the Caton Ridge facility. 447 F. Supp. at 1224. Thus the question of mootness has been raised on appeal. Brief for Appellees, *Caton Ridge Nursing Home Inc. v. Joseph Califano,* No. 78-1290 at 7-8 (4th Cir. filed July 25, 1978. See also *Klein v. Califano,* 586 F.2d 250, 254-5 (3d Cir. 1978).

The Third Circuit has, in the companion to *Town Court,* attempted to distinguish *Caton Ridge* on the basis that the reasons for the decertification of the Caton Ridge Nursing Come were structural rather than deficiencies in services being rendered to the patients. *Klein v. Califano,* 586 F.2d 250, 260, at n. 17 (3d Cir. 1978). This, of course, misperceives the patient's statutory entitlements under Title XIX. Recipients have a legitimate interest in choosing among qualified providers, but they have not been given any role in the evaluation of facilities for purposes of continued participation in the program. Thus, it is largely irrelevant for due process purposes why a particular facility has been determined to be unqualified. Accordingly, there is a division among the Circuits over this important question and, therefore, review of this case is respectfully requested.

B. The Decision of the Lower Court Is Erroneous

The lower court predicated its ruling on its determination that federal law created a constitutionally cognizable property interest in the patients of Town Court in not having that facility decertified.[13] The Court of Appeals relied upon the freedom of choice provision of Title XIX,[14] and administrative regula-

[13] 29a; See *Klein v. Califano,* 586 F.2d 250, 257-259 (3d Cir. 1978).

[14] 42 U.S.C. §1396(a)(23).

tions requiring notice and hearing before a recipient's benefits may be terminated,[15] as well as those restricting the transfer of patients from one facility to another.[16]

However, the court misperceived the effect of these provisions. For example it overlooked the clear statutory mandate that Medicare and Medicaid services only be provided by *qualified* providers. Title XVIII specifically provides that "payment for services furnished an individual may be made only to providers of services which are eligible therefor. . .".[17] Similarly, Title XIX requires that in order for a skilled nursing home to qualify as a Title XIX provider it must satisfy all of the requirements of Title XVIII.[18] This determination of whether or not a provider of services is eligible under this program has been vested by Congress with the Secretary of

[15] 45 C.F.R. §205.10(a)(5) provides:

> an opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance. A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.

[16] 42 C.F.R. §449 provides that a patient may be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay (except as prohibited by the Title XIX program)".

[17] 42 U.S.C. §1395f(a).

[18] 42 U.S.C. §1396a(a)(28).

H.E.W. and the States. Therefore a patient's statutory right to choose among providers is explicitly limited to choosing among qualified providers.

Similarly, the regulatory restrictions on the transfer of patients do not restrict the Secretary's authority under the Act to determine whether or not a particular skilled nursing home is qualified to participate in the program. These transfer provisions only impose a standard of conduct upon nursing home operators. Thus, a patient who has chosen to receive services from a particular *qualified* nursing home may not be transferred by that nursing home provider without cause. 42 C.F.R. §449. Accordingly, this provision has no application in the determination of whether or not a particular nursing home meets the statutory requirements to participate in the program.

Finally, 45 C.F.R. §205.10(a)(5) provides no substantive entitlements to recipients of Medicaid. These procedural requirements of notice and hearing only apply when a recipient's benefits under Medicaid are threatened with termination or diminution. The decision to decertify a particular *provider* of services does not affect the recipient's eligibility for those services. It only requires, as is always the case, that a recipient receive those services from a provider that is qualified to participate in the program. As the dissent in this case recognized, the majority's decision implies that ultimately recipients may have the right under Title XVIII and XIX to continue to receive care in an unqualified home.[19] Accordingly,

[19] 62a; *Town Court*, *supra* at 296. Termination of an existing provider agreement is only one of several ways in which patients might be required to receive care from a dif-

the decision of the lower court by perceiving a property interest where none exists must be reviewed by this Court at this juncture in the litigation.[20]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment in the Court of Appeals for the Third Circuit in this case.

NORMAN J. WATKINS
Deputy Attorney General
Chief, Civil Litigation
EDWARD G. BIESTER, JR.
Attorney General

ferent nursing home. For example, the provider could voluntarily terminate its business, declining to participate in the Title XVIII and XIX programs. The court's opinion would seemingly require hearings in these cases. In fact the reasoning in this case will necessarily be applied to the termination of any provider of governmental benefits to the public.

[20] It is true that the Court of Appeals has remanded the matter to the District Court for further proceedings. However, its decision with respect to the threshold due process question is final and therefore, if an error has been committed in this regard it can only be resolved in this Court. In addition, the interests of judicial economy argue forcefully for review at this time. Indeed, the lower court in a similar due process case has noted the finality of rulings such as are involved here. *Skehan v. Board of Trustees*, Nos. 77-2311/12, slip op. at 22 (3d Cir., Dec. 21, 1978).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474
Class Action

TOWN COURT NURSING CENTER, INC.
and
EMMA COOPER
and
MARY CRAWFORD
and
HAZEL KEMP
and
ARNOLD L. PHILLIPS
and
DELPHINE TADDEI
and
NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Plaintiffs,

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,
and
JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants.

VERIFIED COMPLAINT

1. Plaintiff Town Court Nursing Center, Inc. (hereinafter referred to as "Town Court") is a corporation organized under the laws of the Commonwealth of Pennsylvania with its offices at 1526 Lombard Street, Philadelphia, Pennsylvania, where it operates Town Court Nursing Center, a skilled care facility.

2. Plaintiffs Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt are individuals who have been patients at and residents of Town Court Nursing Center since at least February 28, 1977 and who are qualified as medically indigent under the Pennsylvania Medical Assistance Program, 62 P.S. §441.1 *et seq.* (more commonly known as "Medicaid").

3. Defendant Frank S. Beal is Secretary of Public Welfare of the Commonwealth of Pennsylvania. He is sued both in his individual and his official capacities.

4. Defendant Joseph A. Califano, Jr. is Secretary of the United States Department of Health, Education and Welfare. He is sued both in his individual and his official capacities.

5. Jurisdiction is founded upon 28 U.S.C. §§1331-(a) and 1361. The amount in controversy exceeds $10,000, exclusive of interest and costs.

COUNT I
(Town Court v. Beal)

6. On or about May 20, 1977 defendant Beal, through his deputy, Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, notified Town Court that, effective June 18, 1977, it would "no longer receive payments under the Medical Assistance Program for skilled nursing care or for services provided to Medical Assistance patients."

7. Therefore, effective June 18, 1977, defendant Beal terminated the Skilled Nursing Home Care Agreement entered into by and between the Pennsylvania Department of Public Welfare and Town Court on September 4, 1975 as extended.

8. Pursuant to Federal regulation, Town Court continued to be eligible to receive Medicaid payments until July 18, 1977 when, despite denial of all charges and written appeal and a demand for a hearing, eligibility for such payments ceased.

9. The aforesaid action by defendant Beal violates Town Court's constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

10. Approximately 180 of the 198 patients at Town Court are qualified under the Medicaid program which program pays their charges for use of the facilities at Town Court.

11. In the absence of reimbursement for the services provided these patients, Town Court will be unable to maintain operations and will be forced to

close to avert an overwhelming and irreparable financial loss to its owner, Geriatric and Medical Services, Inc., a public company.

12. There is no adequate remedy at law.

COUNT II

(Emma Cooper, et al. v. Beal)

13. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth herein in full.

14. The individual plaintiffs are in chronic need of the services provided by Town Court which services are not presently available at other skilled care facilities in Philadelphia.

15. The following sets forth the most recent date of admission to Town Court for each of the named individual plaintiffs:

Emma Cooper—July 16, 1976

Mary Crawford—September 23, 1975

Hazel Kemp—October 18, 1973

Arnold L. Phillips—October 18, 1973

Delphine Taddei—October 16, 1976

Nancy Truitt—February 28, 1977

CLASS ACTION ALLEGATIONS

16. The individual plaintiffs are six of the one hundred eighty patients at Town Court eligible to receive Medical Assistance program benefits.

17. Each of these patients will suffer and is suffering a loss of benefits of the aforesaid program

without the benefit of a hearing under 45 C.F.R. §205.10 and in violation of their constitutional rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

18. This action is designated a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

19. If Town Court is compelled to close or otherwise cease providing skilled care services to the members of the plaintiff class, they will suffer immediate and irreparable psychological and physical harm.

COUNT III

(Town Court v. Califano)

20. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth in full herein.

21. By letter dated May 17, 1977, defendant Califano, by his agent, Mr. Robert J. Taylor, Director of Long Term Care, Standards Enforcement, Department of Health, Education and Welfare, notified Town Court that, effective June 18, 1977, its certification as a skilled care facility provider under the Medicare program, pursuant to an agreement dated July 19, 1976, was terminated.

22. In conformity with Federal regulations, Town Court thereupon requested a reconsideration which reconsideration was denied by defendant Califano by his failure to respond to that request as of July 18,

23. Although Town Court has denied all charges and has requested but not yet received a hearing on the merits, defendant Califano has nevertheless ter-

minated Town Court's participation in the Medicare program.

24. The aforesaid action by defendant Califano violates Town Court's constitutional right to due process under the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiffs request that this Honorable Court enter the following preliminary and permanent relief against the defendants herein:

1. Enjoin defendants Beal and Califano, their agents, attorneys, deputies, employees and successors from, prior to a final determination of all appeals by Town Court Nursing Center, Inc. from the termination of its Medicare and Medicaid certifications:

a. terminating the Medicare and Medicaid certifications of plaintiff Town Court Nursing Center, Inc.;

b. removing patients who are eligible for Medicare and Medicaid from Town Court Nursing Center, Inc.'s skilled care facility at 1526 Lombard Street, Philadelphia, Pennsylvania;

c. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries;

d. prohibiting placement of other Medicare and Medicaid patients with plaintiff Town Court Nursing Center, Inc.;

2. Awarding plaintiff Town Court Nursing Center, Inc. the amount, with interest, of any payments heretofore withheld by either of the

defendants on account of their respective decertifications; and

3. Awarding plaintiffs their attorneys fees and costs.

(s) Jeffrey A. Albert
(s) Jeffrey Albert
Jeffrey B. Albert
1401 Walnut Street, 10th Floor
Philadelphia, PA 19102
(215) LO8-5700

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

DANIEL VELORIC, being duly sworn according to law, deposes and says that he is the president of the plaintiff in the within action, that he is authorized to and does take this affidavit on behalf of the plaintiffs in this action and that the averments contained in the within complaint are true and correct to the best of his knowledge, information and belief.

(s) Daniel Veloric
Daniel Veloric

Sworn to and Subscribed Before me this 19th day of July, 1977.

(Illegible)
Notary Public

Notary Public, Phila, Philadelphia Co.
My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,

and

FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, Town Court Nursing Center, Inc., et al., by their attorneys, Nathan L. Posner and Jeffrey B. Albert, Esquires, move this Honorable Court for a temporary restraining order in the form attached hereto restraining defendants as set forth therein pending hearing and determination of plaintiffs' motion for a preliminary injunction, on the ground that immediate and irreparable injury, loss and damage will result to plaintiffs before such hearing can be held and that notice of the filing of this motion has been given as

set forth in the affidavit attached hereto, and plaintiffs further move this Honorable Court for a preliminary injunction granting all preliminary relief prayed for in the Complaint filed in this action.

(s) Jeffrey Albert
Nathan L. Posner
(s) Jeffrey Albert
Attorneys for Plaintiffs

Of Counsel:

Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

I, Maurice E. Linden, being duly sworn, do hereby state and aver as follows:

1. I am a practicing physician duly licensed in the Commonwealth of Pennsylvania. I maintain offices at 7100 Germantown Avenue, in the City of Philadelphia.

2. I am familiar with Town Court Nursing Center, 1526 Lombard Street, Philadelphia, Pennsylvania and the type of patients who reside there.

3. Town Court is a skilled care facility which has a substantial number of elderly and chronically ill patients.

4. Transfer from such a facility may cause these patients to suffer substantial psychological and physical harm and, in certain circumstances, could increase the possibility of serious illness and even death.

5. Unless an individual patient is clearly shown to be able to withstand the trauma of being moved to another facility, I would not favor such a transfer from Town Court.

Maurice E. Linden M.D.

Sworn to and Subscribed before me this 19th day of July, 1977.

(Illegible)
Notary Public

Notary Public, Phila., Philadelphia Co.
My Commission Expires December 16, 1980

Commonwealth of Pennsylvania
County of Philadelphia, ss:

AFFIDAVIT OF DANIEL VELORIC

I, DANIEL VELORIC, being duly sworn, do hereby state and aver as follows:

1. I am the president of Town Court Nursing Center, Inc. which operates a 198-bed skilled nursing facility, at 1526 Lombard Street, Philadelphia, Pennsylvania.

2. Among the patients presently occupying beds at Town Court approximately 180 have been determined to be eligible under Pennsylvania's Medical Assistance Program (commonly known as Medicaid), i.e. indigent persons as defined by 62 P.S. §441.1 *et seq.*

3. As a provider of nursing home services to these patients, Town Court may be reimbursed for its services to these patients by the Commonwealth of Pennsylvania if and only if Town Court is certified for participation in the Medicaid program. 62 P.S. §443.1 (3).

4. That certification is obtained pursuant to an agreement entered into between the Commonwealth and Town Court with respect to Town Court's status as a provider.

5. On September 4, 1975 such an agreement was entered into between the Commonwealth and Town Court.

6. By letter dated May 17, 1977 Mr. Robert Taylor, Director, Office of Long Term Care, Standards Enforcement, United States Department of Health, Education and Welfare, terminated Town Court's certification as a provider under the *Medicare* program by failing to renew the then existing provider agreement dated July 19, 1976 between Town Court and the United States Department of Health, Education and Welfare with respect to that program.

7. By letter dated May 20, 1977 Mr. Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, Commonwealth of Pennsylvania, terminated Town Court's participation in the Medicaid program "due solely to the fact that HEW has notified us of your Title XVIII termination".

8. No means of review of the determination is provided by the Commonwealth of Pennsylvania as to the merits of the termination, the review being limited to whether "HEW has not decided to terminate your

facility from participation in the Medicare program. . . ."

9. No means of review of the termination, by the Federal Government is provided as to the merits *prior to termination* except that Town Court did file a request for reconsideration which request has been ignored.

10. As a result of the aforesaid terminations of Town Court from participation both under the Medicare and Medicaid programs, Town Court is no longer receiving, as of July 19, 1977 an financial reimbursement from any source for the provision of nursing home and related services to any of the individual patients and its other patients, present and prospective, who are or will be entitled to benefits under either of these programs.

11. Town Court will, if no immediate relief is granted it in the instant litigation and insofar as beds are available elsewhere, begin removing plaintiffs from Town Court to other facilities certified for participation in these programs.

12. However, at present there are no known available beds in such facilities and, in fact, there is a tremendous shortage of such beds in the Philadelphia area.

13. Further, Town Court is the largest skilled nursing and intermediate care facility in Philadelphia. It is constantly being asked by local hospitals and other institutions to admit additional Medicare and Medicaid patients for which Town Court has no room.

14. Therefore, unless immediate relief is granted, Town Court is to be left with the unenviable alternative of treating patients for no compensation whatsoever, or literally dumping these ill elderly on the sidewalks of Lombard Street.

15. Further, even were beds available elsewhere, these patients are likely to suffer what has been described as transfer trauma:

> "The damage which may result from such transfers is irreparable in the true sense of the word. Changes in surroundings and movement of long distances of senior citizens who are suffering from physical and psychological infirmities are likely to aggravate their condition and increase the likelihood of death."

Burchette v. Dumpson, 387 F. Supp. 812, 819 (E.D. N.Y. 1974). See also HEW Technical Assistance Memorandum A.A-TA-75-1 (Feb. 19, 1975).

> "There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases in mortality far in excess of what would normally be expected have been documented."

Quoted in *Klein v. Mathews,* 430 F. Supp. 1005 (D. N.J. 1977), and *Hathaway v. Mathews,* 546 F.2d 227, 231 (7th Cir. 1976).

16. But for the Federal and State termination of Town Court, Town Court would have continued to be and desires to continue as a provider under both the Medicare and Medicaid programs.

(s) Daniel Veloric Pres.
Daniel Veloric

Sworn to and Subscribed before me this 19th day of July, 1977.

(s) Francis M. Killian
Notory Public

Notory Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,
and
FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

ORDER

AND NOW, this 21st day of July, 1977, upon consideration of the Verified Complaint, the affidavits submitted therewith, plaintiffs' memorandum of law, the affidavit of plaintiffs' counsel as to the giving of notice to counsel for the defendants herein, and plaintiffs' motions for temporary restraining order and preliminary injunction,

IT IS HEREBY ORDERED AND DECREED that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the defendants, Frank S. Beal and Joseph A. Califano, Jr., each of them, their agents, attorneys, deputies, employees and successors, shall be enjoined and restrained until 2:00 P.M., Tuesday, July 26, 1977, from:

a. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries.

Plaintiffs shall file with this Court security in form satisfactory to the Clerk of the Court in the amount of $100.00.

IT IS FURTHER ORDERED that plaintiffs' motion for preliminary injunction shall be heard by this Court on the day of Tuesday, July 26, 1977 at 2:00 P.M. in Courtroom at the United States Courthouse, 6th & Market Streets, Philadelphia, Pennsylvania.

IT IS FURTHER ORDERED that a true copy of this Order together with the Summons, Complaint, Affidavits and Memorandum of Law be served within three (3) days of the date hereof upon each of the Defendants. Service and the return of service may be made by any competent persons eighteen (18) years of age or older.

(s) John P. Fullam
United States District Juge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, Inc., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare

and

FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

DEFENDANT'S MOTION TO DISMISS

The defendant Secretary Frank S. Beal, by his attorney, M. Faith Angell, Deputy Attorney General for Eastern Pennsylvania, reserving the right to file an answer on the merits if the same is required, hereby moves the Court to dismiss plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b) for the following reasons:

1. The Complaint fails to state a claim against Defendant Beal upon which relief can be granted.

2. The Court lacks subject matter jurisdiction.

3. The absence of a pre-termination hearing fails to rise to a due process constitutional violation.

This Motion is based on the accompanying Memorandum of Law.

Respectfully submitted,
(s) M. Faith Angell
Deputy Attorney General
Michael von Moschzisker
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC. et al.
Plaintiffs

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education & Welfare,
and
FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

MOTION TO DISMISS

Defendant, JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, moves this Honorable Court pursuant to Federal Rule of Civil Procedure 12 (b), to dismiss the complaint against him for the reason that this Court lacks jurisdiction over the subject matter, and that the plaintiffs have failed to establish entitlement to injunctive relief.

Respectfully submitted,
(s) David W. Marston
United States Attorney
(s) Robert N. de Luca
Assistant United States Attorney, Chief, Civil Division

Dated: 29 August 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC. et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health,
Education and Welfare

and

FRANK S. BEAL, Secretary of Public Welfare,
Commonwealth of Pennsylvania
Defendants

PLAINTIFFS' MOTION FOR EXTENSION AND RENEWAL OF PRELIMINARY INJUNCTION

---

1. On July 27, 1977 this Honorable Court issued an Order granting plaintiffs certain preliminary injunctive relief until such time as the United States Department of Health, Education and Welfare gave the parties five (5) days notice of its decision with respect to the request by plaintiff, Town Court Nursing Center, Inc., for reconsideration of HEW's decision to terminate Town Court's status as a Medicare provider.

2. On September 9, 1977, by hand delivery, Town Court, but neither its counsel nor counsel for the individual plaintiffs, received notice that HEW had denied Town Court's request for reconsideration on August 4, 1977, and that such decision would become effective on September 14, 1977.

3. Since the State inspection on June 24, 1977, there has been no Federal or State inspection of Town Court.

4. During the period prior to the reconsideration decision, as well as thereafter, to the best of plaintiffs' knowledge, information, and belief, no efforts have been made by defendants to gain knowledge of the then existing conditions at Town Court.

5. During the period prior to the reconsideration decision, as well as thereafter, Town Court has not been requested by either defendant to change or correct any condition then existing at Town Court.

6. Town Court continues to provide the excellent quality of care and physical environment testified to by plaintiffs' witnesses at the hearing held on July 26 and 27, 1977, which testimony is incorporated herein, by reference.

7. The parties-plaintiff will suffer immediate and irreparable harm if the preliminary injunctive relief granted them on July 27, 1977 is not continued until such time as Town Court's rights to participation in the Medicare and Medicaid programs are fully and finally adjudicated after hearing and judicial review, if necessary.

8. There is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request this Honorable Court to extend and renew the preliminary injunction issued on July 27, 1977 until such time as plaintiffs have exhausted their rights to seek review of defendants' efforts to terminate Town Court Nursing Center, Inc. as a Medicare and Medicaid provider.

(s) Nathan L. Posner
Nathan L. Posner
Jeffrey B. Albert
Attorneys for Town Court Nursing Center, Inc.

(s) William F. Coyle
William F. Coyle
Attorney for Emma Cooper et al.

Of Counsel:

Fox, Rothschild, O'Brien
& Frankel

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc., et al.

v.

Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, et al.

ORDER

AND NOW, this 15th day of September, 1977, upon consideration of plaintiffs' Motion for extending the duration of the preliminary injunction heretofore entered in this case, and after hearing thereon, it is ORDERED:

That plaintiffs' Motion is DENIED, and the preliminary injunction heretofore entered is DISSOLVED: provided, however, that the defendants shall not withhold payments for services actually provided to patients.

John R. Fullam,
J.

Filed September 15, 1977
9/16/77 Copy to USA
Entered: 9/16/77 Clerk of Court

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

AND

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

AND

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants in No. 77-2222

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare,

Appellant in No. 77-2444

Appeal From the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 77-2474)

Argued January 4, 1978

Before: SEITZ, *Chief Judge*, GIBBONS and GARTH, *Circuit Judges*.

Resubmitted In Banc July 10, 1978

Before: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGENBOTHAM, *Circuit Judges*.

(Opinion filed September 29, 1978)

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OPINION ANNOUNCING THE JUDGMENT OF THE COURT

ALDISERT, *Circuit Judge*, with whom Circuit Judges Gibbons, Weis, and Higgenbotham join.

Appellants in No. 77-2222, a proposed class action which was consolidated with *Town Court Nursing Center, Inc. v. Beal*, decided today, — F.2d — (3d Cir. 1978), are six residents at the Town Court Nursing Center who contend that their due process and statutory rights would be violated by termination of Medicaid funding to the nursing home without a pre-termination hearing. Because the district court made no class-action determinations, we treat this as the appeal of the named patients only. They have appealed from an order of the district court denying their motion to extend portions of a preliminary injunction entered during an earlier phase of the litigation.

They had requested a preliminary and permanent injunction to prevent the defendants, "prior to a final determination of all appeals by Town Court Nursing Center, Inc.," from (a) terminating Town Court's Medicare and Medicaid certification; (b) removing eligible patients from Town Court; (c) discontinuing or withholding reimbursement for the care of Medicare and Medicaid patients; and (d) prohibiting future placement of other Medicaid-eligible patients at Town Court.

The district court issued a temporary restraining order on July 21, 1977, enjoining the defendants

from discontinuing or withholding reimbursement for care provided to eligible patients, pending reconsideration by HEW of a preliminary decision to terminate Town Court's provider status. Following a hearing, the district court granted the preliminary injunction sought by plaintiffs. The injunction by its terms was to remain in effect pending completion of the HEW reconsideration process, and until five days after the defendants gave plaintiffs written notice of their intention again to terminate Town Court's provider status. After HEW officials notified Town Court that they had affirmed the initial decision to terminate its Medicare provider status, Town Court and the six individually named appellants sought an order extending the preliminary injunction pending an evidentiary hearing and full judicial review. A hearing on this motion was held on September 15, 1977, after which the district court denied plaintiffs' motion to extend those parts of the preliminary injunction that enjoined removal of patients and that enjoined defendants from prohibiting the placement of new patients. We granted an injunction pending appeal that continued in effect those portions of the preliminary injunction that the district court had refused to extend.

Appellants first allege that they will suffer a de facto loss of Medicare benefits without the protection of a prior hearing if they are subjected to the physiological and psychological harm caused by transfer from Town Court. Second, they believe they have a protected property interest in continued occupancy at Town Court so long as Town Court remains in compliance with the applicable statutes and regulations. Consequently, they say that it was an infringement of these interests not to provide an evidentiary hearing and to allow for judicial review prior to decertification of the nursing center and prior to the de facto terminations of their "rights."

In another case decided today we held that

> [b]ecause a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.

Klein v. Califano, — F.2d —, — (3d Cir. 1978) (typescript opinion at 13). We believe the holding in *Klein* to be controlling as to the issues raised by these appellants. We therefore remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra*, and *Klein, supra*.

In No. 77-2444, Secretary of the Department of Health, Education and Welfare Califano has cross-appealed from that portion of the district court order which required that he "not withhold payments [from Town Court Nursing Center] for services actually provided to patients." *Town Court Nursing Center, Inc. v. Beal*, No. 77-2474 (E.D. Pa., Sept. 15, 1977) (order extending preliminary injunction

in part and dissolving preliminary injunction in part). Because Medicaid certification and funding is so inextricably interrelated with federal administrative action through HEW, *see Town Court, supra,* — F.2d at — (opinion at 5-10) and in view of our holding that the residents of the nursing center have a right to a pre-termination hearing, that portion of the order from which Secretary Califano appeals will be affirmed.

The judgment of the district court in appeal No. 77-2222 will be vacated and the cause remanded for further proceedings consistent with *Town Court, supra,* and *Klein, supra.* Costs taxed against appellees.

The judgment of the district court in appeal No. 77-2444 will be affirmed.

Adams, *Circuit Judge,* with whom Gibbons, Weis and Garth, *Circuit Judges,* join, concurring.

In recent years, the government has become increasingly involved in satisfying the medical needs of its citizens, and the Medicare [1] and Medicaid [2] programs form an integral part of this development. They represent congressional enactments for the benefit of the aged and poverty-stricken sick, those on the fringe of society. This legislation has placed the recipient in a dependent position in relationship to government, and created a situation where the recipient expects to receive the privileges which Congress has voted to provide.

[1] 42 U.S.C. §1395 et seq. and implementing regulations.
[2] 42 U.S.C. §1396 et seq. and implementing regulations.

Due process, which secures legitimate property interests from arbitrary government intrusion, protects many of the expectations that flow from such dependent relationship by requiring that government accord affected individuals the process that is due them before it takes a contemplated course of action that may deny such individuals the benefits they anticipate. But the imposition of due process procedures as a predicate to government action can result in reduced efficiency of government operations and the availability of fewer funds for the intended beneficiaries. Concern has been expressed that unless the procedures made available to affected individuals are carefully fashioned their societal cost would outweigh their benefit.[3]

In this case, the full Court is called upon to determine whether patients whose nursing home is about to be decertified as a qualified institution under the Medicare and Medicaid programs have any due process rights, and if so, the extent of such rights. The factual and procedural background of the controversy as well as the relevant statutory and regulatory provisions are set forth in the various opinions in the companion cases, *Town Court Nursing Center, Inc. v. Beal,* No. 77-2221 (3d Cir., Sept. 29, 1978), and *Klein v. Califano,* No. 77-1896 (3d Cir., Sept. 29, 1978). The appeal in this specific proceeding has been brought by six residents of Town Court Nursing Center who contend that their due process and statutory rights would be violated if they are not given an opportunity for a hearing before Medicaid

[3] *E.g.,* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1276 (1975).

funding to the nursing home is terminated. In opposition, HEW and the Pennsylvania Department of Public Welfare maintain that since termination of a facility's eligibility for Medicaid funding does not affect the patient's entitlement to reimbursement for medical care, the patients have not been deprived of any constitutionally protected property right by the decision to terminate.

The opinion announcing the judgment of the Court relies on the decision filed today in *Klein v. Califano*, No. 77-1869 (3d Cir., Sept. 29, 1978), to conclude that the Medicare and Medicaid laws and regulations grant patients a protectible property right to continued residency at the home of their choice absent specific cause for transfer, and that consequently due process requires that they be given an opportunity for a hearing before decertification of their facility. I concur in that determination, but believe it appropriate to set forth some additional thoughts so as to clarify further this position in view of Chief Judge Seitz's dissent.

Moreover, there has been no discussion of the procedures to which the patients are entitled under due process. In *Klein*, the procedural posture in which the issue was presented rendered moot any discussion of precisely what process was constitutionally mandated. Accordingly, the Court in that appeal stated, "We pretermit the issue of how extensive is the process due patients, such as the plaintiffs here, until a case presents us with a continuing live dispute." *Id.* at 18. It seems to me that *Town Court* is such a controversy. Nonetheless, the opinion announcing the judgment of the Court chooses not to

discuss the issue, but rather to "remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra,* and *Klein, supra.*" Aldisert opinion at 5. Since I believe that in a situation such as this, an appellate court has the obligation to furnish guidance to the district court that may be utilized on remand,[4] this opinion shall also address the problem of what process is due the patients.

I.

An overriding consideration that a court must take into account when it confronts a procedural due process issue is the balance that is to be struck between fairness to the individual and effective government. On the one hand, the concept of due process embodies the law's fundamental respect for the dignity of the individual and its concern to shield him from the arbitrary whims of a government that overwhelms him both in size and power. On the other hand, government could be paralyzed if it were required to afford individuals who will be adversely affected by its decisions lengthy procedural safeguards before it may implement such decisions. The Supreme Court has prudently instructed that these

[4] *See* Geraghty v. United States Parole Commission, Nos. 77-1679 and 77-1858, slip op. at 25 (3d Cir., filed March 9, 1978). Without such guidance there exists the possibility that this Court's energies will be taxed unnecessarily by yet another appeal, and that the trial court may be required to duplicate its effort as well.

competing values be resolved by a two-step analysis.[5] First, it must be ascertained whether the private party has a constitutionally cognizable life, liberty or property right which is threatened by the government action. An open-minded approach towards recognizing such rights enables the law to afford individuals the protection that due process envisions in the multifarious situations in which they are affected by government decisions. Second, the precise protective procedure to which the private party is entitled before he is deprived of his right must be determined. Only at this second step should practical countervailing interests be taken into account to formulate procedures that are responsive to the interests of both the government and the private party. Such methodology, I believe, should control the treatment of the present case.

A.

A survey of the history of due process reveals a steady expansion in protected rights.[6] In large mea-

[5] *See* Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398, 4400, 4401 (U.S., May 1, 1978); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part); *id.* at 177, 186 (White, J., concurring in part and dissenting in part); *id.* at 207, 212 (Marshall, J., dissenting). For a historical sketch of the development of the two-step analysis, *see* L. Tribe, American Constitutional Law §10-8 at 507-08; §10-10 at 532-33 (1978).

[6] *See e.g.*, Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978) (public utility service); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits under Social Security Act); Gross v. Lopez, 419 U.S. 565 (1975) (public high school education); Wolff v. McDonnell, 418 U.S. 539 (1974) ("good time" credits towards a shortened jail sentence, and solitary confinement); Perry v. Sinderman, 408 U.S. 593 (1972) (teacher's employment tenure at state university); Morrissey v. Brewer, 408 U.S. 471 (1972) (conditional freedom following parole); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (state welfare benefits). *But see* cases cited in note 8 *infra*.

sure the source of this trend lies in the recognition that the distinction between those rights which a private party can claim against the government and those benefits to which he merely has a government granted privilege is untenable in a society where individuals are becoming ever more dependent on government "privileges" for their very subsistence.[7] The fundamental concept undergirding due process—that an individual not be stripped of his dignity by being

[7] *See e.g.* Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404 (1963). For discussions of the erosion of the right-privilege distinction, see R. O'Neil, The Price of Dependency: Civil Liberties in the Welfare State (1970); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 Wash. L. Rev. 4 (1964); Powell, *The Right to Work for the State*, 16 Colum. L. Rev. 99 (1916); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-49 (1968); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 Duke L.J. 89; Note, *The Effect of Tenure on Public School Teachers' Substantive Constitutional and Procedural Due Process Rights*, 38 Mo. L. Rev. 279, 281-87 (1973); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. Rev. 1052 (1972).

subject to the arbitrary whims of government—applies with equal force to privileges as to rights. Thus, it is now accepted doctrine that whenever an individual has a "legitimate claim of entitlement" that stems from state or federal law, regulation or practice, he may not be deprived of it without due process.[8]

[8] Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In *Roth* the Supreme Court held that a teacher hired by a state university for a fixed term of one academic year did not possess a constitutionally protected interest in re-employment for the next year. Other cases that have dismissed claims of entitlement on the ground that in fact they merely expressed unilateral expectations that were not recognized by state or federal law include Meachum v. Fano, 427 U.S. 215 (1976) (transfer of prisoner to another state prison); Paul v. Davis, 424 U.S. 693 (1976) (police flyer identifying individual as a "known" shoplifter); Bishop v. Wood, 426 U.S. 341 (1976) (police officer employment). The insistence in these cases that the "legitimate claim of entitlement" be identified only by reference to positive law has been criticized by commentators as manifesting too narrow and rigid a conception of the rights guaranteed by the Constitution and as being internally inconsistent. See L. Tribe, American Constitutional Law §§10-10 & 10-11 (1978); Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977); Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process in the Administrative State, id.* at 445; Tushnet, *The Newer Property: Suggesting for The Revival of Substantive Due Process, 1975 Supreme Court Review 261;* Comment, *Entitlement, Enjoyment and Due Process of Law,* 1974 Duke L.I. 89; Comment *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano,* Harv. Civ. Rights Civ. Lib. L. Rev. 405 (1977); *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 86-104 (1976). However, in determining whether there is a protected property interest in the situation before us, we are bound by the guidelines enunciated by the Supreme Court.

The majority in *Klein* relies on three aspects of the Medicaid scheme[9] to establish as an initial proposition that a resident of a nursing home has "a legitimate entitlement to continued residency at the home of [his or her] choice absent specific cause for transfer."[10] First, reference is made to those provisions that guarantee that a person eligible for medical assistance under Medicaid may obtain medical services from any institution qualified under the federal program to perform such services.[11] Next, the opinion cites the regulations that ensure notice and a hearing to a recipient "who is aggrieved by an agency action resulting in suspension, reduction, discontinuance or termination of assistance."[12] Finally, the majority invokes the provision which states that a resident may be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for

[9] In *Klein,* only termination of Medicaid reimbursements to the nursing home was at issue. In *Town Court,* on the other hand, HEW decertified the facility for Medicaid as well as for Medicare purposes. Nevertheless, *Klein's* treatment of the Medicaid provisions is equally apposite to the Medicare aspect of the *Town Court* litigation since at least two of the provisions of the Medicaid program that were relied upon in *Klein* have their counterparts in the Medicare statute and regulations. *See* notes 11-13 *infra.*

[10] Opinion at 12.

[11] 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The parallel provision in the Medicare scheme is 42 U.S.C. §1395a.

[12] 45 C.F.R. §205.10(a)(5); *id.* §(4)(i). The Medicare scheme guarantees similar procedural protections. 20 C.F.R. §404 901 et seq. (1976); *see id.* at §405.701.

his stay."[13] After inferring a property right from these clauses, the Court in *Klein* posits that "a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare,"[14] and consequently concludes that "Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare."[15]

In his dissent in this case, Chief Judge Seitz takes issue with the *Klein* majority regarding its premises and its conclusion. He finds unpersuasive any inference from the Medicaid plan of a property right that nursing home residents may assert in opposition to decertification of such facility. He notes that the first provision cited by the majority guarantees only that a recipient have the right to choose among *qualified* institutions; that the second provision ensures notice and a hearing only before termination or reduction in benefits, not before transfer from an unqualified facility; and that the third provision imposes upon the medical facility a standard of conduct with regard to transfer and discharge of individual residents and does not create any rights in the residents vis-a-vis HEW.[16]

This attempt by the dissent carefully to delimit the scope of the property right created by the three provisions, I believe, misses the thrust of the regulations

[13] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

[14] Opinion at 13.

[15] *Id.* (footnote omitted).

[16] Opinion at 29.

and tends to trivialize the majority's approach in inferring a basis for the right to due process. Surely the majority does not intend to ground the property rights of the residents of Town Court on the regulation that requires notice and a hearing for the recipient prior to termination or discontinuance of Medicaid benefits. Similarly, the majority undoubtedly acknowledges that the provision that places limitations upon transfer or discharge is addressed only to the facility, not to HEW. However, when conjoined with the grant of freedom to choose among any qualified institutions, these regulations paint three distinct points in the landscape of a "legitimate claim of entitlement" that Medicaid beneficiaries can assert. Taken alone, the interest created by each of these clauses might be dismissed as not rising to the level of a cognizable property interest. However, when viewed together, they compel the conclusion that they identify three aspects of an "underlying substantive interest"[17] that enjoys the stature of "property."

What are the identifiable contours of this property right? First, it is evident that every Medicaid recipient has a protected right to uninterrupted receipt of benefits under the program. He or she may not be deprived of these payments without prior notice and an evidentiary hearing. Second, the regulations allow an elderly, infirm individual who seeks nursing home treatment freedom of choice in selecting the home of his or her preference so long as that home has qualified under the Medicaid program. Once confined

[17] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398, 4400 (U.S., May 1, 1978).

in the home, the resident has a right to remain there, and may be moved only under specific circumstances. The facility itself may transfer or discharge a resident "only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay."[18] The regulations do not explicitly specify any circumstances under which HEW may cause the removal of a resident from his chosen facility. However, at least two such situations are inherent in the regulatory scheme. HEW may instigate a resident's removal by terminating his benefits. Also, HEW may precipitate a resident's transfer to another home by decertifying the facility at which he presently resides, inasmuch as the regulation ensures only the freedom to choose among qualified institutions. This last aspect of the property right is implicated in *Klein* and *Town Court*.

The Supreme Court has repeatedly stated that "some kind of hearing is required at some time before a person is finally deprived of his property interest." *Memphis Light, Gas & Water Division v. Craft*, 46 U.S.L.W. 4398, 4402 (U.S. May 1, 1978), *quoting Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). *See also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Inasmuch as the regulatory scheme invests each resident with a right to remain at the facility of his choosing so long as it qualifies under the plan, the decision to decertify the institution necessarily effects a deprivation of this right and entitles the resident to due process procedures.[19]

[18] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

[19] This conclusion is buttressed by the fact that the regulations already provide the patients with procedural safeguards in the two other situations where their removal from the facility of their choice is authorized, namely, when the facility seeks to transfer them, *see* note 13 and accompanying text *supra*, and when HEW terminates thier benefits, *see* note 12 and accompanying text *supra*.

I agree with the dissent—as must my other colleagues—that nursing home residents have no right to choose or to remain in a non-qualified facility. But that begs the question, at least in the instant case. For this limitation on the residents' property right perforce has no bearing on the issue whether residents of a *presently qualified* facility—as were the Town Court residents at the time in question—must be given the opportunity to participate in deliberations that may lead to the facility's decertification. The continued existence of the residents' constitutionally protected property right to remain in the home of their choice hinges on whether the facility is qualified. And the residents here are seeking to present information touching on that issue. Consequently, due process mandates that before they are deprived of their right, the affected individuals be afforded the opportunity to be heard on the material factual issue of the home's qualification.[20]

[20] This analysis rests solely on the limited property right established by the first provision cited by the *Klein* majority, 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The other two provisions referred to in *Klein* merely shed light on Congress's intent to create a property interest in favor of nursing home residents to remain in the qualified home of their choice.

Accordingly, the interpretation proffered herein does not necessitate making the assertion—made by the *Klein* majority—that decertification of a facility is tantamount to a decision to transfer an individual resident. Nevertheless, the

In addition to disputing the existence of a property right, the dissent makes a number of arguments to support its contention that there is nothing "harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification."[21] First, the dissent attempts to distinguish the Town Court situation from the circumstances presented in the Supreme Court cases employed by the majority[22] on the ground that decertification of an institution does not terminate or otherwise prejudice the rights

analysis here suggests the fallacy in the dissent's refutation of the majority's assertion. The dissent concedes that the practical effect of decertification in most cases is the forced transfer of residents, but maintains that an analytical distinction exists because decertification focuses on the facility's substantial noncompliance with HEW standards. Since residents have no right to remain in an unqualified institution, the dissent reasons " 'transfer trauma' . . . is subordinate to the threat posed to all residents by substandard conditions." Opinion at 30. As pointed out in the text, however, the dissent assumes as a premise the factual issue which the residents seek to contest, namely, whether the institution is unqualified within the meaning of the statute.

Obviously, inasmuch as the holding that residents of a nursing home who receive benefits under the Medicare or Medicaid programs are entitled to due process procedures before the home is decertified rests on this Court's construction of the governing regulations, the decision is limited to such patients. The rights of other patients—such as those hospitalized for mental illness or retardation in state institutions—is dependent upon the language and intent of the provisions controlling their confinement.

[21] Opinion at 30.

[22] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1974).

of the residents to receive Medicaid benefits so long as they live in another, qualified facility. This distinction appears to be beside the point. Just as the right to Medicaid benefits is cognizable under due process, so too is the right to remain at the qualified facility of one's choice, and *this* right *has* been prejudiced by decertification of the facility.

Second, the dissent points out that since the institution has a vested interest in preserving its status under the Medicaid plan, it can be expected to adduce the best case for continued certification. And, the dissent continues, the institution is in the position to correct deficiencies and thus avoid termination. While these observations appear to be correct, they cannot obviate the need under due process to afford residents the opportunity to present *their* perceptions and perspectives on the issue of decertification. It seems to me to be a proposition fraught with danger—and indeed incorrect as a matter of due process analysis—to curtail the legitimate property rights of the residents simply because the residents are funded indirectly through payments to the nursing home, thus creating a property right in the institution as well. Rather, due process protections must be accorded equally to the "legitimate claims of entitlement" of the residents and to the institution.

Third, the dissent suggests that the administrative procedures currently in existence adequately protect the interests of the residents. Chief Judge Seitz specifically takes judicial notice of a Pennsylvania Department of Health manual[23] which states that the

[23] Pennsylvania Department of Health, Long Term Care Facilities Surveyor's Orientation Manual (September 1976).

required on-site predecertification survey "generally involves" interviews with residents,[24] and notes that the survey team consists of highly trained professionals. He also remarks that senile and incompetent residents would often be unable to participate in a due process hearing. Finally, the dissent raises the specter of administrative and judicial delays if residents are afforded participation rights "in all surveys and, presumably, in judicial review of their sufficiency."[25] Since these contentions appear logically to be directed to the *type* of due process procedure to which the residents are entitled, they are best treated in that context.

In sum, the Medicare and Medicaid programs appear to establish a "legitimate claim of entitlement" which must be accorded due process protection. However, even if a court were to conclude that the governing provisions do not on their face create such a property right, it would be required to construe them in a manner that fairly accords with the circumstances of the parties and with the underlying purpose of the due process clause. I believe that the result reached by a majority of this Court comports with that mandate. It would be difficult to contend that nursing home patients do not have a strong interest in avoiding unnecessary transfers. Many of them have been uprooted from the communities in which they spent their working lives. For most of these patients, the limited world of the nursing home is the only community in which they retain a stable network of personal and social relationships. In addition, invalids

[24] *Id.* at III 8-9.

[25] Opinion at 32.

and prospective invalids alike have a strong interest in avoiding the unnecessary physical hardship that could result from a mistaken transfer. These "home" and "health" interests, I submit, are among those that most persons would regard as being encompassed by the protections of the due process clause.

Also, we may take judicial notice of the fact that the plaintiff patients in these cases are physically weakened, economically disadvantaged, and often without significant contact with or control over the "outside community." Economic need and physical incapacity appear to have forced them to seek support from the government. They thus are members of a class of persons to whom the enforcement of essential procedural protections through a non-majoritarian branch of the government is of special importance.[26] For us to construe the controlling provisions strictly against the patients in such circumstances would seem to violate elementary notions of fairness.

These practical factors, to my mind, are relevant and persuasive on the issue of whether the statute and regulations should be interpreted to create a protected property interest in this case. The majority's reading of the statute fairly conforms to these underlying equitable concerns. Even if the dissent's strict construction were textually plausible, it is inconsistent with this more elemental understanding of the problem.

The kind of issue raised in this case is one that this Court will doubtless face again. Federal transfer pay-

[26] See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

ments, which are an enormous factor in total economic activity, have resulted in all sorts of new quasi-contractual relationships. They have thereby transformed, for millions of persons, the very nature of property. An occupant of a nursing home, for example, will in many cases have no property interest in this world other than the expectation of occupying a familiar room and seeing familiar faces. Because that expectation does not fit into a conventional legal pigeonhole like a leasehold for a term or a tenure of employment, many judges may be uncomfortable with the thought of affording it appropriate due process protection. But there is, it seems to me, more rather than less need for the recognition of minimum due process protections for the new forms of property which arise out of the increasing role of government in transfers of the fruits of the economy. We should be alert for and receptive to claims for due process protection of those new forms of property, and where the terms of the authorizing rules permit, we should be prepared to take a practical rather than a technical approach to such claims, whenever it is necessary to protect the dignity and autonomy of those who participate in wealth transfer programs.

B.

Once it is determined that the government is constrained from taking a particular action affecting private parties without according them due process of law, it is essential to ascertain what process is due. The principle that governs this second phase of the due process inquiry is to be contrasted with the inclusive approach towards identifying the rights that are entitled to due process protection. As the Supreme Court has instructed, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands". *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), *quoting Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).[27] Thus, practical considerations play a prominent role in fashioning the procedural safeguards that will implement the fundamental due process concern of preventing officals from arbitrarily interfering with private endeavors. The practical considerations reflect the recognition that the government must be able to function efficiently and expeditiously and that if scarce public resources are to be used optimally, the government cannot be unduly fettered in administering its programs by costly and time consuming bureaucratic procedures.[28] Therefore, in assessing what procedural safeguards are necessary before government may deprive a private party of a constitutionally protected interest, courts should be careful to require only the minimal protections mandated by due process, leaving the other branches of government free to determine the extent of the procedural protective mechanisms that will be authorized.[29] The constitutionality of a chosen scheme should be upheld if it permits the aggrieved party to air his views in such a manner that the risk of an erroneous determination by the government is reduced and the value of other, more burdensome procedures

[27] *See also* Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugees Comm. v. McGrath, 341 U.S. 123, 162-63 (Frankfurter, J., concurring).

[28] *See* Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976).

[29] *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

is outweighed by the cost and delay that they would entail.

This flexible framework for analyzing what procedural safeguards are mandated by due process has been clearly articulated in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

> [R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra,* at 167-168 (Powell, J., concurring in part); *Goldberg v. Kelly,* at 263-266; *Cafeteria Workers v. McElroy,* at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g., Goldberg v. Kelly, supra,* at 263-271.

When balancing the governmental and private interests to arrive at the process that is due, only once has the Supreme Court insisted on a full evidentiary hearing before the government decision in question

became effective.[30] The Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970), held unconstitutional a procedure which provided for written submissions by the welfare recipient but no hearing before payments were cut off. In requiring that the welfare recipient be afforded a pre-termination full evidentiary hearing at which he can appear personally, offer oral evidence and confront witnesses, *Goldberg* recognized that

> "the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desparate. This need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Id. at 264. (emphasis in original). The Court concluded that "the interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the state's competing concern to prevent any increase in its fiscal and administrative burdens." *Id.* at 266.

In other cases before the Supreme Court, due process has been found to be satisfied by administrative procedures that did not include a full evidentiary hearing before the deprivation. Thus, where a private party sought to garnish property, the Court held that due process requirements were met if the garnish-

[30] *See* Mathews v. Eldridge, 424 U.S. 319, 340 (1976).

ing party was required to initiate an *ex parte* proceeding before a neutral officer, supply an affidavit supporting the claim to the property, and post a bond, provided that the aggrieved party is given an opportunity to contest the seizure promptly thereafter. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Also, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court upheld the administrative procedures for dismissing a federal employee for cause, which included a copy of the charge and an opportunity to file a written response and to make an oral appearance before the dismissal, with an evidentiary proceeding only thereafter. Just last term the Supreme Court found that an informal administrative remedy whereby a customer whose municipal utility service was to be cut off for nonpayment of bills would be permitted to meet with "a responsible employee empowered to resolve the dispute" was sufficient to satisfy the dictates of due process. *Memphis Light, Gas and Water Division v. Craft*, 46 U.S.L.W. 4398, 4403 (U.S., May 1, 1978).

Of the recent Supreme Court pronouncements regarding the process that is due in various situations, *Mathews v. Eldridge*[31] is most instructive for determining what protections must be accorded the patients in the instant case. In *Eldridge* the Supreme Court was faced with whether due process required that a recipient of Social Security disability payments be afforded an opportunity for an evidentiary hearing before his benefits were terminated. After carefully

[31] 424 U.S. 319 (1976).

balancing the private[32] and public[33] interests as they were manifested in the situation before it and evaluating the fairness and reliability of the existing pretermination procedures,[34] the Court found that the elaborate administrative mechanism provided by the Social Security Administration[35] satisfied the

[32] The Court determined that since the recipient is entitled to retroactive benefits if he ultimately prevails, his only interest is in the uninterrupted receipt of funds pending final disposition of his claim. 424 U.S. at 340.

[33] The Court mentioned "the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision," and noted the strong interest of the public "in conserving scarce fiscal and administrative resources", particularly since "the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving . . ." 424 U.S. at 347-48.

[34] The Court focused on the fact that in most cases the validity of the disability claim hinges on the evaluation of easily documented routine and unbiased medical reports, and concluded that since credibility is rarely an issue the reports could be assessed upon written submissions, as provided in the existing procedures. This was found to create a decided distinction between *Eldridge* and *Goldberg v. Kelly, supra*, in that oral presentation was deemed to be essential for a welfare recipient to communicate his case to the decision-maker in view of the low educational level of most recipients. 424 U.S. at 343-45.

[35] Among other procedural safeguards, the administrative mechanism required the state agency which administered the program to evaluate periodically the recipient's continued eligibility. Its assessments were to be based on investigations performed by its own medical and nonmedical personnel as well as upon information which it solicited from those who treated the recipient and from a detailed

mandate of due process, and that a full evidentiary hearing was not required. Noteworthy is the admonition with which the Court concluded its opinion:

> [T]he judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decisionmaking in all circumstances. . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair considera-

questionnaire from the recipient himself. Upon reaching a tentative conclusion that benefits should be terminated, the agency was required to provide the recipient with a summary of the evidence upon which it based its assessment, to afford him an opportunity to review his file, and to permit him to respond in writing and submit additional evidence. After the state agency made its final determination, it was to be reviewed by an examiner in the Social Security Administration Bureau of Disability Insurance and accepted by the Administration. Benefits were to be terminated two months after the month in which medical recovery is found to have occurred. The recipient is given the right to have the termination reviewed by different levels in the state agency, the Administration, and finally, the federal courts. If he prevails to any degree the recipient is entitled to retroactive payments. 424 U.S. at 336-39.

> tion of the entitlement claims of individuals. See *Arnett v. Kennedy*, 416 U.S., at 202 (White, J., concurring in part and dissenting in part).

424 U.S. at 348-49.

It is evident, in view of *Eldridge*, that the Town Court residents need not be afforded an evidentiary hearing before the decision to decertify the facility becomes final. *Eldridge* emphasized that the critical element that underlay *Goldberg's* requirement of a pre-termination evidentiary hearing was that without welfare benefits the recipient was left destitute, and would in all likelihood be unable to pursue his administrative remedies. This factor was found lacking in *Eldridge*,[36] and is also absent from the situation in Town Court, where the patients will continue to receive Medicaid assistance after their transfer to other facilities. Consequently, no justification would seem to exist here for departing from the general rule that due process is satisfied by "something less than an evidentiary hearing,"[37] as long as the selected procedures "assure fair consideration of the entitlement claims of individuals."[38]

In determining what process is due the Town Court residents, it is helpful to place in perspective the purpose that will be served by such procedures. Obviously, the facility's residents cannot be expected to play a primary role in the decision to decertify. As the dissent points out, the main burden for presenting the case in support of continued certification must

[36] 424 U.S. at 340-43.

[37] Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

[38] *Id.* at 349.

rest with the institution itself, since it has the greatest financial interest at stake and is in the better position to adduce relevant facts and to correct violations. Still, the facility's residents have a two-fold, unique interest that should be accommodated by the due process-mandated procedures.

First, the residents have a legitimate claim that they be permitted to supplement any data gathered from other investigative sources regarding the issue whether the facility qualifies under federal and state standards. On the basis of their first-hand experiences the residents can provide relevant information—which cannot be obtained from other sources—concerning the daily functioning of the institution as it affects them.[39]

Second, the residents should be allowed to bring to light other factors that ought to be weighed before a facility is decertified and its Medicare and Medicaid patients moved elsewhere. The distinction between

[39] As the lower court in *Klein* aptly commented,

> While the court is deferential to the expertise of HEW, it is rank paternalism to suggest that patients who live in a facility, who have firsthand knowledge of the conditions, who are best equipped to describe how that facility has served them, cannot contribute to the process by which it is determined whether the facility meets federal standards. The court finds it hard to understand how HEW can seriously argue that the very patients whom HEW seeks to protect can have no purposeful role with respect to the condition of their environment.

Klein v. Mathews, 430 F. Supp. 1005 (D.N.J., 1977), *remanded with instructions to dismiss as moot*, No. 77-1896 (3d Cir., Sept. 29, 1978).

qualified and unqualified homes is not marked by a bright line. Rather, an institution is decertified when, in the judgment of the federal and state administrators charged with reviewing its performance, it is not in "substantial compliance" with applicable standards and is unlikely to correct its violations.[40] As the Town Court proceedings indicate, a facility may technically be in noncompliance with the standards for a period of years before it is finally decertified.[41] In view of the discretionary nature of a decision to decertify an institution, it seems reasonable to conclude that where the patient transfer that inevitably accompanies decertification would result in serious hardship or danger to the patients, the administrators probably would be reluctant to decertify the institution and would seek instead to alleviate the nonconforming conditions through alternative sanctions. For instance, if it were brought to the administrators' attention that ten patients were in an intensive care unit recovering from recent heart attacks and that moving them would endanger their lives, the decisionmakers might decide to maintain the institution's certification on a temporary basis. The residents are entitled to an opportunity to present factors such as these which affect their right to remain at the qualified institution of their choice.

[40] 42 U.S.C. §1395cc(b)(2).

[41] Thus, despite various deficiencies, Town Court was able to maintain its status as a qualified facility from the time of its certification in 1967 until October, 1974, because it was still in "substantial compliance" and because it continually submitted plans of correction. Town Court Nursing Center, Inc. v. Beal, No. 77-2221, opinion at 10 (3d Cir., Sept. 29, 1978).

Besides the usual interests in reducing administrative burdens and other social costs, the government's interests in many ways complement those of the patients. Of prime concern to the government is the patients' well-being.[42] To this end the statutory scheme requires periodic inspections and evaluations of the facility.[43] Also, the patients' welfare necessitates expeditious action to close down facilities with dangerous conditions.

With this assessment of the interests of the patients and the government, the precise process that is due residents of an institution prior to decertification may now be outlined. The interests of the patients and the government can optimally be served by informal and flexibly-structured procedures whose purpose would be to permit the patients to provide relevant information on a decision that will have a major effect on their lives before that decision is made, while not unduly delaying or complicating the administrative process.

Since the patients are clustered at the facility and the information sought is within their knowledge, their participation could be solicited upon short notice. In fact, the procedure by which data is obtained from them could easily be incorporated into the present apparatus for investigating and surveying the institution.[44] As part of the numerous surveys that are conducted at the institution prior to decertification, the government representatives should therefore assemble the residents of the facility for an informal opportunity to express their views. At such occasion the government representative should explain the contemplated action, the reasons for it, and its potential effect on the patients. Then the patients should be asked to comment. This gathering should be supplemented with individual interviews with those patients who did not attend, since the reasons which prevented them from attending may also justify a determination that they should not be transferred. To ensure the greatest degree of input and to accommodate the needs of the various residents, they should be given the opportunity to present material both orally and in writing, and be offered assistance in formulating their responses.[45]

[42] *Cf.* 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976) (regulation permits facility to transfer patients only, *inter alia*, "for his welfare or that of other patients.").

[43] 45 C.F.R. §250.23 (1976). The statute limits accreditation of a facility to twelve months, 42 U.S.C. §1395cc(a)(1), thus necessitating annual surveys.

[44] 45 C.F.R. §250.23(a)(3)(v) (1976) specifically requires that the medical review team inspection include "personal contact with and observation of each patient receiving assistance under the plan by a team member or members, and review of each such patient's medical record." *See also* text accompanying note 23 *supra* (dissent takes judicial notice of Pennsylvania manual stating that on-site survey "generally involves" interviews with residents).

[45] Allowing the patients this flexibility in choosing among alternative modes of communication appears to be mandated in light of the Supreme Court's discussion in Mathews v. Eldridge, *see* note 34 *supra*. Many of the elderly patients who reside in nursing homes may share with the welfare claimant in Goldberg v. Kelly the inability to communicate effectively in writing. Others may feel intimidated or embarrassed by their fellow residents' presence at the gathering and prefer not to disclose personal concerns. Still others may be both unable to communicate in writing and unwilling to

The fact that many residents are physically or mentally too infirm to take advantage of any procedural machinery that would be established is an inadequate reason for not setting up a mechanism that will meaningfully represent their constitutionally-protected interests. If a patient is too sick to participate, he may be too sick to be transferred, and the investigators should be required to look into that possibility. Also, the needs of these unfortunate individuals can be presented by relatives, friends, or other representatives, who should be notified of such opportunity.

Carefully circumscribed procedures—as previously suggested—for protecting the rights of nursing home residents who receive benefits under the Medicaid program in remaining at the qualified institution of their choice, at least until it has been determined to be unqualified, would appear appropriate. The limited participation afforded by such an arrangement would not unduly impede the government's ability to take decisive and prompt action to ensure the welfare of the patients. It would not constrict the freedom of the other branches of the government by requiring the establishment of bureaucratic machinery or necessitating costly expenditures.

Moreover, it would not be required at the annual survey of the facility but only in the infrequent event that decertification of the facility is proposed, since only in that event do the regulations invest the residents with a protectible property right. Finally, it would not clog the courts, because patients who are

speak in public, but would be willing to discuss their concerns in private interviews.

transferred to a different facility as a result of a procedurally fair determination to decertify the institution at which they resided rarely will have any reason to question the administrative decision in a post-decertification court battle. Nevertheless, granting the patients this limited opportunity to air their concerns sufficiently reduces the risk of an erroneous deprivation of the rights of those who potentially are affected most seriously by the decision to constitute the process that is due them.

CONCLUSION

As often occurs in cases involving constitutional issues, the factual situation presented in Town Court may not be a particularly appealing one for expounding constitutional protections. The nursing home has a history of noncompliance with the governing regulations. It has been subject to a number of extensive investigations and had been afforded opportunities to correct deficiencies before it was finally decertified. Nonetheless, when a court is adjudicating constitutional principles, its view should not be obscured by the fact that one or the other litigant does not measure up to a particular standard. Although the government's decertification decision may eventually be proven to be correct, that is not the point at issue in the patient's appeal. Rather, we have been asked to address the limited questions whether the governing regulations secure the right to residents of a facility presently qualified under Medicare and Medicaid to be heard before the facility is decertified, and if so,

the extent of this right. I believe that in recognizing in the patients a right to participate while carefully limiting its content, an approach has been suggested that both enhances the values of due process and is practical in its application.

SEITZ, *Chief Judge*, dissenting.

Judge Aldisert's opinion relies on the majority opinion filed today in *Klein v. Califano*, No. 77-1896 (September 29, 1978, 3d Cir.). In this dissent, therefore, I primarily address the reasoning in *Klein*, with some reference to the concurring opinion herein.

Klein holds that due process requires that residents of an intermediate health care facility be given an opportunity for a hearing before decertification of that facility. Initially, the *Klein* majority postulates that HEW's regulations grant residents a "property right" not to be transferred without cause. As its minor premise, the majority asserts that an initial administrative decision to decertify an institution is tantamount to an order to transfer. We are to deduce, then, that Medicaid residents are constitutionally entitled to an opportunity to participate in the proceedings that may lead to an initial decertification. I cannot agree either with the majority's premises or with its conclusion.

The majority recognizes, as it must, that due process would place procedural constraints on HEW only if the residents' interests in continued occupancy enjoy the stature of "property." An independent source, here the Medicaid law and regulations, must create

the "underlying substantive interest" that is to be accorded this stature; federal constitutional law then determines whether that interest "rises to the level of a 'legitimate claim of entitlement' protected by due process." *Memphis Light, Gas & Water Division v. Craft*, — U.S. —, —, 98 S.Ct. 1554, 1560 (1978).

The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U.S.C. §1396a(a)(23), a Medicaid recipient may obtain medical care "from any institution . . . qualified to provide service or services required." Clearly, what the majority characterizes as a recipient's right to obtain medical care from a "freely selected provider" is limited to a choice among institutions which have been determined by the Secretary to be "qualified." Next, the majority's reliance on 45 C.F.R. §205.10(a)(5), ensuring a notice and hearing to a recipient whose benefits are suspended, reduced, discontinued or terminated, is obviously misplaced. As the majority itself notes, the decertification of these facilities did not reduce or suspend the residents' rights to continued benefits.

Finally, the majority relies upon 45 C.F.R. §249.12(a)(1)(ii)(B)(4),[1] which establishes as one requirement for an institution's certification that each resident admitted to that institution be "transferred or discharged only for medical reasons or for his wel-

[1] 45 C.F.R. §249 (1976) has been recodified at 42 C.F.R. §449 (1977). In conformity with the majority opinion all citations to that section will be to the earlier codification.

fare or that of other patients, or for nonpayment for his stay." The majority reads this provision as a limitation on the Secretary's power to interrupt a recipient's residence at a particular institution. Clearly, however, this provision is a standard of conduct imposed by the Secretary upon the provider. Violation of this standard is one of many grounds for decertifying the offending institution. *See* 45 C.F.R. §§249.33 (a) (2), 249.10(b) (15). The provision creates no "substantive interest" in the residents vis-a-vis the Secretary.

Moving to its minor premise, the majority postulates that a decision to decertify is tantamount to a decision to transfer individual residents. Practically, of course, this may be a consequence in most cases, at least where an institution fails to remedy its insufficiencies. Analytically, however, the two decisions are different. Decertification focuses on the institution's noncompliance with HEW's standards. The majority does not and cannot contend that recipients have a right to remain in an institution that the Secretary has found, by appropriate procedures, to be in substantial noncompliance with the standards. "Transfer trauma," although a legitimate concern for some residents, is necessarily subordinate to the threat posed to all residents by substandard conditions.

Thus, a careful reading of the provisions cited by the majority reveals that neither statutes nor regulations grant the residents of an intermediate health care facility a "substantive interest" in decertification proceedings brought by the Secretary; hence, the residents have no constitutionally protected property right in uninterrupted occupancy.

The concurring opinion in this case concedes that "[t]aken alone, the interest created by each of [these provisions] might be dismissed as not rising to the level of a cognizable property interest." Nonetheless, we are asked to agglomerate these "three distinct points" into a "landscape of a 'legitimate claim of entitlement.'" Each of the provisions governs an isolated and inapposite aspect of the program's administration. Their effect as a whole, then, cannot be greater than the sum of their parts. Nor is such infirmity rehabilitated by expressions of concern, in which I join, for the welfare of patients generally.

There is nothing harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification. Significantly, a decertification of a non-complying facility does not terminate or otherwise prejudice the rights of the residents to continued Medicaid benefits. Their benefits will be paid so long as they reside in an intermediate health care facility that complies with federal standards. This important fact immediately distinguishes the cases, employed by the majority in *Klein*, in which the individual involved suffered possible direct prejudice to some substantive liberty or property interest.[2]

Furthermore, and of substantial significance, there is resident input in the survey that must precede an initial decertification. We may take judicial notice of a document entitled "Long Term Care Facilities Sur-

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[3] *Memphis Light, Gas & Water Division v. Craft*, U.S. , 98 S.Ct. 1554 (1978); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

veyor's Orientation Manual" published in September 1976 by the Pennsylvania Department of Health. On pages III 8-9 of the Manual, in a section entitled "Survey Methodology," the Manual notes that an on-site survey "generally involves" interviews with residents. On page III-7 the Manual suggests that the surveyor at times may have to assume the role of "patient advocate."

A nursing home is not even initially terminated until elaborate proceedings conducted by professionals have resulted in a determination that the institution is not complying substantially with the provisions of its agreement with the Secretary. Here, the survey team consisted of two registered nurses, a dietician, and an equal opportunity development specialist. *See Town Court v. Beal*, No. 77-2221 (filed September 29, 1978, 3d Cir.).

While the Medicaid program itself has been enacted for the benefit of the residents, the survey proceedings are necessarily concerned with the applicable conditions of participation as set forth in the regulations. One should not lose sight of the fact, however, that the ongoing monitoring of participating health care facilities is primarily designed to protect the health and safety of the residents.

In many cases residents would not be in physical or medical condition to participate even minimally in a decertification hearing. Indeed, it is not clear what duties the majority in *Klein* would impose upon the Secretary where senile or incompetent residents are incapable of representing their own interests. Furthermore, since all such facilities must be surveyed

annually, it is evident that the majority's position would require that residents be afforded "due process" rights in all surveys and, presumably, in judicial review of their sufficiency.

The provider, of course, has a vested interest in "defending" his institution during any survey and so may be expected to adduce the best case for continued certification. Furthermore, he is the one who can correct deficiencies and thus avoid a termination.

Both the law and the facts dictate the conclusion that the mandated initial termination procedures do not deprive these residents of due process.

I would affirm the order of the district court refusing to extend portions of the preliminary injunction (No. 77-2222) and I would reverse the order of the district court continuing in effect part of the preliminary injunction (No. 77-2444).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

and

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education, and Welfare.

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI, and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants in
No. 77-2222,

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare,

Appellant in
No. 77-2444.

Before: Seitz, *Chief Judge*, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, and Higginbotham,

Circuit Judges

ORDER AMENDING OPINION

It Is Ordered that the printed slip opinion filed September 29, 1978 be amended as follows:

The following paragraph is added on page 32 at the end of the dissenting opinion:

Judge Rosenn and Judge Hunter join this dissent.

Collins J. Seitz
Chief Judge

Dated: October 13, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE, ET AL.,

Petitioners,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorai in the above-entitled cause be, and the same is hereby, extended to and including February 7, 1979.

(s) Wm. J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 18 day of December, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE,

Petitioner,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including February 26, 1979.

(s) William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 25 day of January, 1979.

Supreme Court, U. S.
FILED
JUN 11 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

(VOLUME I—Pages 1a-190a)

In the Supreme Court of the United States

Oct. [redacted] Term, 1979

No. 78-1318

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE,

Petitioner

vs.

TOWN COURT NURSING CENTER, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

Petition for Certiorari Filed February 26, 1979

Certiorari Granted April 16, 1979

TABLE OF CONTENTS

PAGE

VOLUME I:

I. Docket Entries 1a

II. Verified Complaint 7a

III. Motions for Temporary Restraining Order and Preliminary Injunction 15a

IV. Order Dated July 21, 1977 ..... 22a

[Scheduled Hearing Transcript of Testimony and Exhibits Appear in Volume II.]

V. Defendant Beal's Motion To Dismiss 24a

VI. Defendant Califano's Motion To Dismiss 26a

VII. Plaintiffs' Motion for Extension and Renewal of Preliminary Injunction 28a

VIII. Opposing Affidavit of Claudette V. Campbell 30a

Attachment 1 ..... 36a

Attachment 2 ..... 54a

Attachment 3 ..... 58a

Attachment 4 ..... 61a

Attachment 5 .....108½a

[Hearing Transcript and Exhibits Appear in Volume II.]

IX. Order Dated September 15, 1977 ..... 117a

X. Further Order Dated September 15, 1977 118a

XI. Notice of Appeal of Plaintiffs, Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt 120a
XII. Notice of Appeal of Town Court Nursing Center, Inc. 122a
XIII. Motion for Injunction Pending Appeal 124a
XIV. Order of Court of Appeal Granting Town Court's Motion 142a
XV. Opinion Announcing the Judgment of the Court 144a
Concurring Opinion 150a
Dissenting Opinion 181a
XVI. Order Amending Opinion 187a
XVII. Order Extending Time To File Petition for Writ of Certiorari 189a
XVIII. Order Further Extending Time To File Petition for Writ of Certiorari 190a
VOLUME II:
XIX. Preliminary Hearing, July 26, 27, 1977 191a
PLAINTIFF, TOWN COURT NURSING CENTER, INC'S EVIDENCE:
Donald Lewis:
Direct Examination 196a
Cross-Examination 207a
Redirect Examination 216a
Tobias Bund:
Direct Examination 216a
Cross-Examination 221a
William J. Jones:
Direct Examination 222a
Cross-Examination 227a

John E. Cuminskey:
Direct Examination 229a
Cross-Examination 248a
Dr. Maurice E. Linder:
Direct Examination 251a
Cross-Examination 253a
Jesse Gaynor:
Direct Examination 254a
Cross-Examination 259a
Edward J. Zelkovitz:
Direct Examination 262a
Cross-Examination 263a
Redirect Examination 267a
DEFENDANT CALIFANO'S EVIDENCE:
Gerald Szuc:
Direct Examination 269a
Cross-Examination 282a
PLAINTIFFS' EXHIBITS:
1—Photograph, Cobbs Creek Nursing Home 290a
2—Photograph, Town Court Nursing Center 290½a
3—Letter Dated 5/20/77, to Donald Lewis, Administrator, Town Court Nursing Center, from the Commonwealth of Pennsylvania, Department of Public Welfare ... 291a
4—Letter Dated 5/17/77, to Town Court Nursing Center from the Department of Health, Education and Welfare 294a
5—Report by Professor Tobias Bund entitled "Analysis of Statement of Deficiencies Resulting from Survey Conducted March 8-11, 1977" 300a

6—Report by William J. Jones entitled "An Evaluation of the Town Court Nursing Center, June 1977" 318a

7—Report by John E. Cuminskey, Dated 6/28/77 ..... 343a

8—Report by Mr. Gaynor to Mr. Jones Dated 6/17/77 ..... 357a

9—Report by Mr. Gaynor to Mr. Coyle, Dated 7/19/77 ..... 365a

10—Report by Dr. Finkelstein to Mr. John W. Francks, Executive Director, Geriatric and Medical Centers, Inc., Dated 7/12/77 .. 369a

11—Letter from the Department of Health, Education and Welfare to Town Court Nursing Center, Dated July 19, 1976 .... 378a

DEFENDANTS' EXHIBITS:

1—Letter With Attachment Dated 5/26/77 to Donald Lewis, Administrator, Town Court Nursing Center, from Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare 380a

2—Letter Dated 6/23/77, to Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare from Donald Lewis, Administrator, Town Court Nursing Center 387a

3—Letter With Attachment Dated 2/7/77 to John Holbrook, Administrator, Town Court Nursing Center, Inc., From Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare 390a

4—Document Entitled "Statement of Deficiencies and Plan of Correction" for Town Court Nursing Center 400a

5—Document Concerning Town Court Nursing Center Entitled "Medicare/Medicaid Certification and Transmittal" 423a

6—Report Concerning Town Court Nursing Center Entitled "Medicare/Medicaid Skilled Nursing Facility Survey Report" 424a

XX. Transcript of Hearing Before Hon. John P. Fullam, J. on September 15, 1977 .... 495a

DEFENDANT'S EVIDENCE:

Claudette V. Campbell:

Direct Examination 501a

Cross-Examination 512a

Redirect Examination 518a

PLAINTIFFS' EVIDENCE:

Donald Lewis:

Direct Examination 522a

William J. Jones:

Direct Examination 523a

Cross-Examination 526a

Opinion and Order 531a

PLAINTIFFS' EXHIBITS:

12—Letter From Mr. Laff, Pennsylvania Department of Health, to Mr. Lewis, Administrator, Town Court Nursing Home, Dated July 29, 1977, With Attached Report 534a

13—Report From William Jones to Leonard Coyle, Undated 545a

DEFENDANTS' EXHIBITS:

7—Affidavit of Claudette V. Campbell . . . 30a. 550a

8—Document Entitled "Fourth Presentment" by the Special Investigating Grand Jury of April Term, 1976 Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section 551a

VOLUME I

APPENDIX

I.

DOCKET ENTRIES

Plaintiffs

TOWN COURT NURSING CENTER, INC.

and

COOPER, EMMA; CRAWFORD, MARY; KEMP, HAZEL; PHILLIPS, ARNOLD L.; TADDEI, DELPHINE; TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

Defendants

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

Cause

Civil Rights

Attorneys

William F. Coyle, 1430 Land Title Bldg., Phila., Pa. 19110, for: All plffs. EXCEPT Town Court Nursing Center, Inc.

Nathan L. Posner, Jeffrey D. Albert, Fox, Rothschild, O'Brien and Frankel, 1401 Walnut St., 10th Flr., Phila., Pa. 19102, for: Town Court Nursing Center, Inc.

Robert deLuca, Asst. United States Attorney.

M. Faith Angell, Deputy Attorney General, 206 State Office Bldg., Phila., Pa. 19130, for: Frank S. Beal.

Proceedings

Date Nr.

1977

1 July—20 Complaint filed.

—July—20 Summons Exit. (2 sets).

2 July—20 Plffs' motions for temporary restraining order and preliminary injunction, memorandum of law in support and affidavit, filed.

—July—21 The sum of $100.00 deposited into Registry of Court.

3 July—21 Motion and Order appointing James Bray, Jr. to serve the complaint and summons upon the defts., filed.

4 July—21 Order that defts, agents, et al., are enjoined and restrained until 7/26/77 from discontinuing or withholding payments to plff. Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries; plffs shall file with this Court security to the Clerk of Court in the amount of $100, motion for preliminary injunction heard on 7/26/77 at 2:00 p.m. in courtroom 15A, etc., filed. JF 7/22/77 entered and copies mailed.

5 July—27 Entry of appearance of William F. Coyle on behalf of plffs and withdrawal of appearance of Jeffrey B. Albert on behalf of plffs., filed.

6 July—27 Hearing re: Preliminary injunction, 7/26/77, filed.

7 July—27 Hearing re: preliminary injunction, 7/27/77, T.R.O. remains in effect pending final administrative review, filed.

8 July—27 Defts' brief in opposition to plff's motion for preliminary injunction and in support of deft's motion to dismiss and certification, filed.

9 July—29 Summons returned "with affidavit of Patricia S. Jantorna re: served Dept. of HEW—Deputy General Counsel and Joseph A. Califano, Jr. by cert. mail on 7/25/77, filed.

10 July—29 Summons Returned "with affidavit of James Bray, Jr. re: served U.S. Attorney on 7/22/77", filed.

11 July—29 Acceptance of Service of James R. Adams for Frank S. Beal, of summons, complaint, etc., filed.

12 August—3 Summons Returned "with affidavit of Patricia C. Jantorna re: served Attorney General by cert. mail on 7/28/77", filed.

13 August—19 Deft. Frank S. Beal's motion to dismiss, memorandum of law in support, certificate of service, and notice, filed.

14 August—29 Deft. Joseph Califano, Jr.'s motion to dismiss, memorandum of law, and certificate of service, filed.

15 September—2 Plaintiffs' Memorandum of Law in Opposition to defendants' motion to dismiss, filed.

16 September—12 Plfts' motion for extension & renewal of preliminary injunction, and memorandum of law, filed.

17 September—15 Transcript of preliminary hearing on July 26, 27, 1977, filed.

18 September—15 Order that plfts' motion for extending the duration of preliminary injunction, Denied and the preliminary injunction entered is Dissolved: provided, however, that defts. shall not withhold payments from services actually provided to patients, filed. JPF, J. 9/16/77 Entered and copies mailed.

19 September—15 Order, that this Court's Order dissolving preliminary injunction entered is Stayed for a period of 10 days from date hereof, to permit pltfs to file notice of appeal, etc., plft's. request for a longer stay from this court is Denied, filed. JPF 9/16/77 enter and copies mailed.

20 September—15 Hearing re: plfts'. motion to extend preliminary injunction is Denied Without Prejudice, filed.

21 September—15 Brief of Federal deft. in opposition to plft's. motion to extend preliminary injunction, and Certification, filed.

22 September—19 Transcript of trial testimony held 9/15/77, filed.

23 September—16 Notice of appeal of Emma Cooper, et al. received 9/16/77 at 4 PM, filed. (Appeal 77-2222) 9/20/77 entered & copies to Nathan L. Posner, Robert deLuca, M. Faith Angell.

24 September—16 Copy of Clerk's notice to U.S. Court of Appeals, filed.

—September—16 Bond for costs on Appeal in the sum of $250 with Fidelity & Deposit Co. of Maryland as surety, filed.

25 September—16 Notice of Appeal of Town Court Nursing Center, Inc., received 9/16 at 4:05 PM, filed. 9/20/77 entered & copies to William F. Coyle, Esq., Robert deLuca, M. Faith Angell.

26 September—16 Copy of Clerk's notice to U.S. Court of Appeals, filed. (Appeal No. 77-222).

—September—16 Bond for costs on Appeal in the sum of $250 with Fidelity & Deposit Co. of Maryland as surety, filed.

27 September—26 Certified copy of Order U.S. Court of Appeals Granting appellants' motion for injunction pending appeal, etc., filed.

—September—26 Sum of $100.00 deposited into Registry of Court.

—October—11 Original record transmitted to U.S.-C.A. (except paper No. 4)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Class Action

TOWN COURT NURSING CENTER, INC.

and

EMMA COOPER

and

MARY CRAWFORD

and

HAZEL KEMP

and

ARNOLD L. PHILLIPS

and

DELPHINE TADDEI

and

NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical

Assistance Program benefits at Town Court Nursing Center, Inc.,

Plaintiffs,

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants.

II.

VERIFIED COMPLAINT

---

1. Plaintiff Town Court Nursing Center, Inc. (hereinafter referred to as "Town Court") is a corporation organized under the laws of the Commonwealth of Pennsylvania with his offices at 1526 Lombard Street, Philadelphia, Pennsylvania, where it operates Town Court Nursing Center, a skilled care facility.

2. Plaintiffs Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Teddei and Nancy Truitt are individuals who have been patients at and residents of Town Court Nursing Center since at least February 28, 1977 and who are qualified as medically indigent under the Pennsylvania Medical Assistance Program, 62 P.S. §441.1 *et seq.* (more commonly known as "Medicaid").

3. Defendant Frank S. Beal is Secretary of Public Welfare of the Commonwealth of Pennsylvania. He is sued both in his individual and his official capacities.

4. Defendant Joseph A. Califano, Jr. is Secretary of the United States Department of Health, Education and Welfare. He is sued both in his individual and his official capacities.

5. Jurisdiction is founded upon 28 U.S.C. §§1331 (a) and 1361. The amount in controversy exceeds $10,000, exclusive of interest and costs.

COUNT I

(Town Court v. Beal)

6. On or about May 20, 1977 defendant Beal, through his deputy, Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, notified Town Court that, effective June 18, 1977, it would "no longer receive payments under the Medical Assistance Program for skilled nursing care or for services provided to Medical Assistance patients."

7. Therefore, effective June 18, 1977, defendant Beal terminated the Skilled Nursing Home Care Agreement entered into by and between the Pennsylvania Department of Public Welfare and Town Court on September 4, 1975 as extended.

8. Pursuant to Federal regulation, Town Court continued to be eligible to receive Medicaid payments until July 18, 1977 when, despite denial of all charges and written appeal and a demand for a hearing, eligibility for such payments ceased.

9. The aforesaid action by defendant Beal violates Town Court's constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

10. Approximately 180 of the 198 patients at Town Court are qualified under the Medicaid program which program pays their charges for use of the facilities at Town Court.

11. In the absence of reimbursement for the services provided these patients, Town Court will be unable to maintain operations and will be forced to close to avert an overwhelming and irreparable financial loss to its owner, Geriatric and Medical Services, Inc., a public company.

12. There is no adequate remedy at law.

COUNT II

(Emma Cooper, et al. v. Beal)

13. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth herein in full.

14. The individual plaintiffs are in chronic need of the services provided by Town Court which services are not presently available at other skilled care facilities in Philadelphia.

15. The following sets forth the most recent date of admission to Town Court for each of the named individual plaintiffs:

Emma Cooper—July 16, 1976
Mary Crawford—September 23, 1975
Hazel Kemp—October 18, 1973

Arnold L. Phillips—October 18, 1973
Delphine Taddei—October 16, 1976
Nancy Truitt—February 28, 1977

CLASS ACTION ALLEGATIONS

16. The individual plaintiffs are six of the one hundred eighty patients at Town Court eligible to receive Medical Assistance program benefits.

17. Each of these patients will suffer and is suffering a loss of benefits of the aforesaid program without the benefit of a hearing under 45 C.F.R. §205.10 and in violation of their constitutional rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

18. This action is designated a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

19. If Town Court is compelled to close or otherwise cease providing skilled care services to the members of the plaintiff class, they will suffer immediate and irreparable psychological and physical harm.

COUNT III

(Town Court v. Califano)

20. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth in full herein.

21. By letter dated May 17, 1977, defendant Califano, by his agent, Mr. Robert J. Taylor, Director of Long Term Care, Standards Enforcement, Department of Health, Education and Welfare, notified

Town Court that, effective June 18, 1977, its certification as a skilled care facility provider under the Medicare program, pursuant to an agreement dated July 19, 1976, was terminated.

22. In conformity with Federal regulations, Town Court thereupon requested a reconsideration which reconsideration was denied by defendant Califano by his failure to respond to that request as of July 18, 1977.

23. Although Town Court has denied all charges and has requested but not yet received a hearing on the merits, defendant Califano has nevertheless terminated Town Court's participation in the Medicare program.

24. The aforesaid action by defendant Califano violates Town Court's constitutional right to due process under the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiffs request that this Honorable Court enter the following preliminary and permanent relief against the defendants herein:

1. Enjoin defendants Beal and Califano, their agents, attorneys, deputies, employees and successors from, prior to a final determination of all appeals by Town Court Nursing Center, Inc. from the termination of its Medicare and Medicaid certifications:

a. terminating the Medicare and Medicaid certifications of plaintiff Town Court Nursing Center, Inc.;

b. removing patients who are eligible for Medicare and Medicaid from Town Court Nursing Center, Inc.'s skilled care facility at 1526 Lombard Street, Philadelphia, Pennsylvania;

c. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries;

d. prohibiting placement of other Medicare and Medicaid patients with plaintiff Town Court Nursing Center, Inc.;

2. Awarding plaintiff Town Court Nursing Center, Inc. the amount, with interest, of any payments heretofore withheld by either of the defendants on account of their respective decertifications; and

3. Awarding plaintiffs their attorneys fees and costs.

(s) Jeffrey B. Albert
(s) Nathan L. Posner
Jeffrey B. Albert
1401 Walnut Street, 10th Floor
Philadelphia, PA 19102
(215) LO8-5700

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

DANIEL VELORIC, being duly sworn according to law, deposes and says that he is the president of the plaintiff in the within action, that he is authorized

to and does take this affidavit on behalf of the plaintiffs in this action and that the averments contained in the within complaint are true and correct to the best of his knowledge, information and belief.

(s) Daniel Veloric
Daniel Veloric

Sworn to and Subscribed Before me this 19th day of July, 1977.

(Illegible)
Notary Public
Notary Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,

and

FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

III.

MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, Town Court Nursing Center, Inc., et al., by their attorneys, Nathan L. Posner and Jeffrey B. Albert, Esquires, move this Honorable Court for a temporary restraining order in the form attached hereto restraining defendants as set forth therein pending hearing and determination of plaintiffs' motion for a preliminary injunction, on the ground that immediate

and irreparable injury, loss and damage will result to plaintiffs before such hearing can be held and that notice of the filing of this motion has been given as set forth in the affidavit attached hereto, and plaintiffs further move this Honorable Court for a preliminary injunction granting all preliminary relief prayed for in the Complaint filed in this action.

(s) Jeffrey Albert
Nathan L. Posner
(s) Jeffrey Albert
Attorneys for Plaintiffs

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

I, Maurice E. Linden, being duly sworn, do hereby state and aver as follows:

1. I am a practicing physician duly licensed in the Commonwealth of Pennsylvania. I maintain offices at 7100 Germantown Avenue, in the City of Philadelphia.

2. I am familiar with Town Court Nursing Center, 1526 Lombard Street, Philadelphia, Pennsylvania and the type of patients who reside there.

3. Town Court is a skilled care facility which has a substantial number of elderly and chronically ill patients.

4. Transfer from such a facility may cause these patients to suffer substantial psychological and physical harm and, in certain circumstances, could increase the possibility of serious illness and even death.

5. Unless an individual patient is clearly shown to be able to withstand the trauma of being moved to another facility, I would not favor such a transfer from Town Court.

Maurice E. Linden M.D.

Sworn to and Subscribed before me this 19th day of July, 1977.

(Illegible)
Notary Public
Notary Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

Commonwealth of Pennsylvania
County of Philadelphia, ss:

AFFIDAVIT OF DANIEL VELORIC

I, DANIEL VELORIC, being duly sworn, do hereby state and aver as follows:

1. I am the president of Town Court Nursing Center, Inc. which operates a 198-bed skilled nursing facility, at 1526 Lombard Street, Philadelphia, Pennsylvania.

2. Among the patients presently occupying beds at Town Court approximately 180 have been determined to be eligible under Pennsylvania's Medical

Assistance Program (commonly known as Medicaid), i.e. indigent persons as defined by 62 P.S. §441.1 *et seq.*

3. As a provider of nursing home services to these patients, Town Court may be reimbursed for its services to these patients by the Commonwealth of Pennsylvania if and only if Town Court is certified for participation in the Medicaid program. 62 P.S. §443.1 (3).

4. That certification is obtained pursuant to an agreement entered into between the Commonwealth and Town Court with respect to Town Court's status as a provider.

5. On September 4, 1975 such an agreement was entered into between the Commonwealth and Town Court.

6. By letter dated May 17, 1977 Mr. Robert Taylor, Director, Office of Long Term Care, Standards Enforcement, United States Department of Health, Education and Welfare, terminated Town Court's certification as a provider under the *Medicare* program by failing to renew the then existing provider agreement dated July 19, 1976 between Town Court and the United States Department of Health, Education and Welfare with respect to that program.

7. By letter dated May 20, 1977 Mr. Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, Commonwealth of Pennsylvania, terminated Town Court's participation in the Medicaid program "due solely to the fact that HEW has notified us of your Title XVIII termination".

8. No means of review of the determination is provided by the Commonwealth of Pennsylvania as to the merits of the termination, the review being limited to whether "HEW has not decided to terminate your facility from participation in the Medicare program. . . ."

9. No means of review of the termination, by the Federal Government is provided as to the merits *prior to termination* except that Town Court did file a request for reconsideration which request has been ignored.

10. As a result of the aforesaid terminations of Town Court from participation both under the Medicare and Medicaid programs, Town Court is no longer receiving, as of July 19, 1977 any financial reimbursement from any source for the provision of nursing home and related services to any of the individual patients and its other patients, present and prospective, who are or will be entitled to benefits under either of these programs.

11. Town Court will, if no immediate relief is granted it in the instant litigation and insofar as beds are available elsewhere, begin removing plaintiffs from Town Court to other facilities certified for participation in these programs.

12. However, at present there are no known available beds in such facilities and, in fact, there is a tremendous shortage of such beds in the Philadelphia area.

13. Further, Town Court is the largest skilled nursing and intermediate care facility in Philadelphia.

It is constantly being asked by local hospitals and other institutions to admit additional Medicare and Medicaid patients for which Town Court has no room.

14. Therefore, unless immediate relief is granted, Town Court is to be left with the unenviable alternative of treating patients for no compensation whatsoever, or literally dumping these ill elderly on the sidewalks of Lombard Street.

15. Further, even were beds available elsewhere, these patients are likely to suffer what has been described as transfer trauma:

> "The damage which may result from such transfers is irreparable in the true sense of the word. Changes in surroundings and movements of long distances of senior citizens who are suffering from physical and psychological infirmities are likely to aggravate their condition and increase the likelihood of death."

Burchette v. Dumpson, 387 F. Supp. 812, 819 (E.D. N.Y. 1974). See also HEW Technical Assistance Memorandum A.A-TA-75-1 (Feb. 19, 1975).

> "There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases in mortality far in excess of what would normally be expected have been documented."

Quoted in *Klein v. Mathews,* 430 F. Supp. 1005 (D. N.J. 1977), and *Hathaway v. Mathews,* 546 F.2d 227, 231 (7th Cir. 1976).

16. But for the Federal and State termination of Town Court, Town Court would have continued to be and desires to continue as a provider under both the Medicare and Medicaid programs.

(s) Daniel Veloric Pres.
Daniel Veloric

Sworn to and Subscribed before me this 19th day of July, 1977.

(s) Francis M. Killian
Notary Public
Notary Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health,
Education and Welfare,

and

FRANK S. BEAL, Secretary of Public Welfare,
Commonwealth of Pennsylvania,
Defendants

IV.

ORDER

AND NOW, this 21st day of July, 1977, upon consideration of the Verified Complaint, the affidavits submitted therewith, plaintiffs' memorandum of law, the affidavit of plaintiffs' counsel as to the giving of notice to counsel for the defendants herein, and plaintiffs' motions for temporary restraining order and preliminary injunction,

IT IS HEREBY ORDERED AND DECREED that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the defendants, Frank S. Beal and Joseph A. Califano, Jr., each of them, their agents, attorneys, deputies, employees and successors, shall be enjoined and restrained until 2:00 P.M., Tuesday, July 26, 1977, from:

a. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficaries.

Plaintiffs shall file with this Court security in form satisfactory to the Clerk of the Court in the amount of $100.00.

IT IS FURTHER ORDERED that plaintiffs' motion for preliminary injunction shall be heard by this Court on the day of Tuesday, July 26, 1977 at 2:00 P.M. in Courtroom at the United States Courthouse, 6th & Market Street, Philadelphia, Pennsylvania.

IT IS FURTHER ORDERED that a true copy of this Order together with the Summons, Complaint, Affidavits and Memorandum of Law be served within three (3) days of the date hereof upon each of the Defendants. Service and the return of service may be made by any competent persons eighteen (18) years of age or older.

(s) John P. Fullam
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health,
Education and Welfare

and

FRANK S. BEAL, Secretary of Public Welfare,
Commonwealth of Pennsylvania,
Defendants

V.

DEFENDANT'S MOTION TO DISMISS

The defendant Secretary Frank S. Beal, by his attorney, M. Faith Angell, Deputy Attorney General for Eastern Pennsylvania, reserving the right to file an answer on the merits if the same is required, hereby moves the Court to dismiss plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b) for the following reasons:

1. The Complaint fails to state a claim against Defendant Beal upon which relief can be granted.

2. The Court lacks subject matter jurisdiction.

3. The absence of a pre-termination hearing fails to rise to a due process constitutional violation.

This Motion is based on the accompanying Memorandum of Law.

Respectfully submitted,

(s) M. Faith Angell
Deputy Attorney General
Michael von Moschzisker
Deputy Attorney General,
Eastern Regional Director
Robert P. Kane
Attorney General

206 State Office Building
Philadelphia, Pa. 19130
Telephone: (215) 238-6661

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc. et al.
Plaintiffs

v.

Joseph A. Califano, Jr., Secretary of Health, Education & Welfare

and

Frank S Beal, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

VI.

MOTION TO DISMISS

Defendant, JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, moves this Honorable Court pursuant to Federal Rule of Civil Procedure 12(b) to dismiss the complaint against him for the reason that this Court lacks jurisdiction

over the subject matter, and that the plaintiffs have failed to establish entitlement to injunctive relief.

Respectfully submitted,
/s/ David W. Marston
United States Attorney
/s/ Robert N. deLuca
Assistant United States Attorney
Chief, Civil Division

Dated: 29 August 1977

VII.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLAINTIFFS' MOTION FOR EXTENSION AND RENEWAL OF PRELIMINARY INJUNCTION

[Caption Omitted]

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1. On July 27, 1977 this Honorable Court issued an order granting plaintiffs certain preliminary injunctive relief until such time as the United States Department of Health, Education and Welfare gave the parties five (5) days notice of its decision with respect to the request by plaintiff, Town Court Nursing Center, Inc., for reconsideration of HEW's decision to terminate Town Court's status as a Medicare provider.

2. On September 9, 1977, by hand delivery, Town Court, but neither its counsel nor counsel for the individual plaintiffs, received notice that HEW had denied Town Court's request for reconsideration on August 4, 1977, and that such decision would become effective on September 14, 1977.

3. Since the State inspection on June 24, 1977, there has been no Federal or State inspection of Town Court.

4. During the period prior to the reconsideration decision, as well as thereafter, to best of plaintiffs' knowledge, information and belief, no efforts have been made by defendants to gain knowledge of the then existing conditions at Town Court.

5. During the period prior to the reconsideration decision, as well as thereafter, Town Court has not

been requested by either defendant to change or correct any condition then existing at Town Court.

6. Town Court continues to provide the excellent quality of care and physical environment testified to by plaintiffs' witnesses at the hearing held on July 26 and 27, 1977, which testimony is incorporated herein, by reference.

7. The parties-plaintiff will suffer immediate and irreparable harm if the preliminary injunctive relief granted them on July 27, 1977 is not continued until such time as Town Court's rights to participation in the Medicare and Medicaid programs are fully and finally adjudicated after hearing and judicial review, if necessary.

8. There is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request this Honorable Court to extend and renew the preliminary injunction issued on July 27, 1977 until such time as plaintiffs have exhausted their rights to seek review of defendants' efforts to terminate Town Court Nursing Center, Inc. as a Medicare and Medicaid provider.

(s) Nathan L. Posner
Nathan L. Posner
Jeffrey B. Albert
Attorneys for Town Court Nursing Center, Inc.

(s) William F. Coyle
William F. Coyle
Attorney for Emma Cooper et al.

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

VIII.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT OF CLAUDETTE V. CAMPBELL

[Caption Omitted]

State of Pennsylvania
County of Philadelphia *ss*

CLAUDETTE V. CAMPBELL, being duly sworn, deposes and says as follows:

I am Claudette V. Campbell, a registered nurse with a Bachelor of Science degree in Nursing and a Master of Public Health degree. I am a Commissioned Officer in the United States Public Health Service, holding the rank of Senior Nurse Officer. In 1974, I received an appointment as Program Officer/Nurse Consultant to the Office of Long Term Care Standards Enforcement. This agency was incorporated into the Health Standards and Quality Bureau, Health Care Financing Administration, Region III, United States Department of Health, Education and Welfare on June 19, 1977.

One of my functions as the Regional Office Long Term Care Nurse Consultant is to review provider files prepared for termination from participation in the Medicare/Medicaid program. The purpose of my review is to ensure that Federal health standards have been applied and documented substantially in accordance with Federal regulations. The other critical determination that is made is an evaluation of the effect of non-compliance with the Conditions of Participation on the health and safety of patients in the facility under review. My findings are a result of a thorough review of all documentation submitted by the State agency and a review of the provider file. After the above review is completed, I recommend either concurrence or non-concurrence with the adverse action to the Director, Office of Long Term Care Standards Enforcement.

The following statement summarizes the developments culminating in my decision on May 12, 1977 to recommend to the Director of the Office of Long Term Care Standards Enforcement acceptance of the State survey agency's recommendation of non-renewal of Town Court Nursing Center's provider agreement, which had expired April 30, 1977.

1. On January 1, 1967, the facility received conditional approval for participation in the Medicare program based on the State agency's finding of a serious nurse staffing deficiency. Other deficiencies related to the requirement that oral orders should only be given to a licensed nurse, and reduced immediately to writing, and physicians should be advised of stop order policies and contacted for renewal of orders.

2. On May 9, 1968, a supplement to the initial agreement was issued to the facility based on substantial progress in correcting deficiencies outlined above. However, remaining deficiencies noted included pharmaceutical services: all medications administered to patients were not ordered in writing by the patient's physician, oral orders were not given only to a licensed nurse, and were not immediately reduced to writing.

3. A State survey agency visit on September 8-9, 1971 resulted in deficiencies being noted, including the following: physicians orders were not being revised every 30 days, and maintenance of sanitary conditions in the entire kitchen area including store rooms and staff dining room areas was "deplorable".

4. The State survey agency made a special visit to the facility on January 28, 1972 and found deficiencies previously listed corrected, but an additional deficiency noted was in Nursing Service in that there was no night supervising nurse for the three weeks prior to the survey.

5. On April 10, 1972, a supplemental agreement was issued as a result of the facility's substantial compliance, with correctible deficiencies. The deficiencies noted include incorrect storage of medication and poor housekeeping.

6. A survey performed by the State agency on October 23, 1973 revealed deficiencies including nursing staff shortages, an unlicensed nurse as shift supervisor, medications not properly recorded, labeled, or stored, narcotic records not properly maintained, patient call bells removed, and inadequate housekeeping.

7. A special unannounced survey visit on March 19-20, 1974 by the State agency revealed numerous serious deficiencies and the results were transmitted to Office of Long Term Care Standards Enforcement with a termination recommendation. (See Attachment 1).

8. On March 28, 1974 the facility received an extention to their agreement to May 31, 1974 to determine whether compliance with the Conditions of Participation had been achieved.

9. On May 9, 10 and 15, 1974, an unannounced licensure visit was conducted and revealed continuing major deficiencies. (See Attachment 2).

10. On May 22, 1974, the facility was notified that it was being given a short term agreement, for a period of 90 days, from June 1, 1974 to August 31, 1974, to correct the deficiencies that were found during survey visits on March 19 and 20, 1974.

11. Based on the results of revisits by the State survey agency on May 9, 10, 15, 1974 and June 3, 4, 5, 1974 (see Attachment 3), a recommendation of non-renewal was made by the State survey agency.

12. On September 30, 1974, the facility was notified that its provider agreement would not be renewed and that its participation in the program was terminated as of October 31, 1974.

13. Survey results of April 14, 1976 revealed no deficiencies, and the facility was readmitted to the program effective that date.

14. The Office of Long Term Care Standards Enforcement received a request from the District Attorney's Office, Philadelphia, Pennsylvania, Economic Crime Unit, to investigate complaints of poor care at the facility on July 8, 1976.

15. A Federal survey performed July 19-23, 1976 substantiated the above complaint. In addition, the following Conditions of Participation were not met:

Medical Direction and Nursing Services. The Conditions of Participation for Physican Services and Dietary Services were only marginally met, and additional standards were found not met. (See Attachment 4).

16. On November 22-24, 1976, an unannounced survey was performed by the State survey agency. An Office of Long Term Care Standards Enforcement staff member participated in the survey on November 22, 1976. A physician from the State survey agency also participated. The same and additional Conditions of Participation and standards were found not met. (See Attachment 5).

17. The facility filed a Plan of Correction dated February 10, 1977 which was unacceptable to the State survey agency based on omission of completion dates for the correction of deficiencies. A new plan of correction was submitted March 17, 1977 showing completion dates.

18. On April 21, 1977, the Pennsylvania Department of Health forwarded the November 1976 and March 1977 survey results with a Certification and Transmittal recommending non-renewal of the facility's provider agreement.

Non-compliance with the Conditions of Participation impacts significantly on the health and safety of the patients at Town Court and poses a threat to their welfare. It is imperative that medical direction, physician services, nursing services, and pharmaceutical services, be provided in a safe and adequate manner. The State survey findings reveals significant omissions in these areas.

Of equal importance in my concurrence with the recommendation of non-renewal was the pattern demonstrated by the facility of having the same standards not met on successive resurveys starting from 1974 through 1977. The facility has not performed in a responsible matter with respect to maintenance of health standards in order to ensure adequate and safe services. The history on file clearly demonstrates this central weakness in the facility. All of the above can be substantiated by a careful review and analysis of the actual reports.

(s) Claudette V. Campbell
Claudette V. Campbell

Sworn to and subscribed before me this 14th day of September, 1977.

Kathleen Taylor
Notary Public
Philadelphia, Philadelphia Co.

My commission expires October 31, 1977.

ATTACHMENT 1

Supplemental

Form Approved
Budget Bureau No. 72-R0725.

CERTIFICATION AND TRANSMITTAL

PROVIDER NUMBER: 39-5129

TO BE COMPLETED BY STATE AGENCY

1. NAME AND ADDRESS OF FACILITY

Tem Court Nursing Center, Inc.
1526 Lombard Street
Philadelphia, Pennsylvania 19146

2. TYPE OF FACILITY
(a) ☐ Gen. Hosp. (b) ☐ Psych. Hosp. (c) ☐ TB Hosp. (d) ☒ ECF (e) ☐ HHA (f) ☐ Independent Lab. (g) ☐ Portable X-ray (h) ☐ Outpatient Physical Therapy

TO:
BHI Regional Representative
Regional Office, Philadelphia, Penna.

4. TYPE OF ACTION
(a) ☐ Initial (b) ☐ Recertification (c) ☐ Reconsideration (d) ☐ Change of Ownership

5. DATE OF APPLICATION: 11/30/65

6. STATE: Pennsylvania

7. PURSUANT TO PROVISIONS OF SEC. 1864 OF THE SOCIAL SECURITY ACT, AND UPON CONSIDERATION OF ALL FACTS, THE FACILITY IS CERTIFIED AS:

(a) ☐ In substantial compliance with the conditions of participation (with no significant deficiencies)

(b) ☐ In substantial compliance with the conditions of participation (with correctable deficiencies)

(c) ☐ Meeting the conditions for special certification (limited access)

(d) ☒ Not (or no longer) in compliance with conditions of participation or the requirements for special certification (limited access).

8. SUPPLEMENTAL INFORMATION ON HOSPITALS AND ECF'S NOT IN COMPLIANCE

(a)(1) ☐ Hospital meets emergency services hospital definitions
(2) ☐ Does not meet
(b)(1) ☐ Facility meets 1861(e)(1)-Definition of hospital
(2) ☐ Does not meet
(c)(1) ☐ Facility meets 1861(j)(12)-Definition of ECF
(2) ☐ Does not meet
(3) ☐ See attached SSA-1539(a)

9. "DISTINCT PART" CERTIFICATIONS
(a) Beds certified
(b) Beds prev. certified

10. ACCREDITATION VERIFIED
(a) ☐ JCAH (b) ☐ AOA

11. RECERTIFICATIONS (Change in accreditation status only) (a) ☐ Accredited (b) ☐ Lost JCAH accreditation (c) ☐ Lost AOA accreditation

12. RECOMMENDED RE-SURVEY DATE

13. CONDITIONS OF PARTICIPATION WITH SIGNIFICANT DEFICIENCIES (Circle) (completed when items 7b, 7c, or 7d are checked.)

I (II) (III) (IV) (V) (VI) VII (VIII) IX X XI XII (XIII) XIV (XV)
(XVI) (XVII) XVIII XIX XX XXI XXII XXIII XXIV XXV

14. EVIDENCE AND REASONING (Include results of consultation)

Certification relates to entire facility: 138 Beds.

Termination of provider agreement is recommended as deficiencies identified place health and safety of patients in jeopardy.

☐ CONT. ON ATTACHED SHEET

15. PREPARED BY
Jack E. Sinnar, R.E.

16. DATE: 3/20/74

TITLE
Registered Nurse

17. REVIEWED BY
John W. Simmons, M.D.
Exec. Dep. Sec., Dept. of Health

18. DATE

TO BE COMPLETED BY

19. DETERMINATION OF ELIGIBILITY
(a) ☐ Facility is eligible to participate (b) ☐ Facility is not (or no longer) eligible to participate

20. ☐ Facility is in compliance with Title VI of Civil Rights Act

21. EFFECTIVE DATE OF:
(a) Participation (b) Termination

MEDICARE BRANCH
DIVISION OF NURSING HOMES

(c) Emergency Services

22. AS ACTIONS
(a) ☐ Voluntary Termination (b) ☐ Other (Specify)

23. INTERMEDIARY NUMBER

24. REMARKS

52

25. DATE

Opposing Affidavit of C.V. Campbell

36a

March 27, 1974

Madeleine S. Bowen, R.N.
Field Representative
Standards and Licensure

Narrative Report

An unannounced visit was made to Town Court Nursing Home, 1526 Lombard Street, Philadelphia, Pennsylvania 19146 for the purpose of investigating a complaint and documenting a post recertification Medicare and Medicaid visit.

Mrs. Marjorie Steever, R.N. Survey Validation Office, Department of Health, Mr. Jack Slusser, R.N. and Mrs. Madeleine Bowen, R.N., Field Representatives from the Southeastern Regional Office, were admitted to the facility at 9:35 P.M. on March 19, 1974. The visit was terminated at 2:45 A.M. on March 20, 1974.

This facility is a five (5) story brick and masonry building in the densely populated area of Philadelphia. The capacity is 138 beds. Patients are housed on the second (2), third (3) and fourth (4) floors. The census on the night of the visit was 134 patients. Several patients had been sent to the hospital. Eighty-seven (87) patients were on Medical Assistance and 13 were on Medicare.

A nurses aide admitted the representatives to the home and then summoned Mrs. Walker, R.N., Supervisor on the 3-11 tour of duty. The representatives introduced themselves and Mrs. Bowen stated the purpose of the visit. Mrs. Walker, R.N. was advised to notify the Administrator Mr. John Thomas

of the presence of the representatives in the facility and the purpose of the visit.

Mrs. Walker telephoned Mr. Thomas.

Mr. Thomas spoke with Mrs. Bowen on the telephone. He offered to come into the home and be available. He was informed that most of the necessary data was readily available except the closed files which were locked in his office. Upon questioning by Mr. Thomas, Mrs. Bowen stated she hoped to complete the visit in two (2) hours, but could not say for certain how much time would be necessary since the survey had not yet begun. Mr. Thomas related that his traveling time was 40 minutes each way and therefore he would not come in for the visit.

Mr. Thomas is an unlicensed nursing home administrator and is planning to take the state licensure examination in April 1974. He had been advised by Mrs. Bowen on January 14, 1974 to apply for a provisional license but has failed to do so because of the cost involved.

Mrs Walker, R.N. supervisor on the 3-11 tour of duty was from an agency known as Medical Personnel Pool and was not an employee of the home. She stated she worked at Town Court an average of three (3) evenings a week.

Mrs. Walker provided Mr. Slusser with the current nursing time schedules for his review while Mrs. Steever and Mrs. Bowen conducted a tour of the fifth (5) floor.

Discrepancies were found in staffing of nursing personnel. Mrs. Moise, R.N. 11-7 and Mrs. De-

Vastey, R.N. 3-11 appeared on the nursing schedule but it was learned that Mrs. Moise had not worked for several weeks and Mrs. DeVastey had resigned. The nurse on 11-7 tour of duty, Mrs. Bernard was a foreign nurse not licensed in Pennsylvania. The nursing schedule showed no 3-11 R.N. scheduled on March 15, 16, 17, 1974. On the 7-3 tour of duty on March 16, 17, 1974 there was no scheduled relief for the Director of Nurses. There were quantitative deficiencies on the 7-3 tour of duty on March 16, 17, on 3-11 on March 15, 16, 17, and on 11-7 on March 14, 16, 17th. There was a time clock and time cards in the nurses station on second (2) floor but almost all of the time cards were blank.

Mrs. Smith, a nurses aide on her first night of duty had been assigned to another nurses aide for orientation. Nurses aides on the 11-7 tour of duty "thought" they had inservice, but could not relate to the last topic discussed.

Fifth Floor

Two (2) nursing personnel were on the 5th floor, Mrs. Bush L.P.N. and an aide. Mrs. Bush, L.P.N. was in charge of the fifth floor and accompanied the representatives. The census on this floor was 34 patients. Plastic bags of soiled linen were found in the hallway and the alcove near the refrigerator. The refrigerator was soiled with spilled juice. In Rooms 511 and 516, foley catheter bags were observed lying on the floor. There was no H_2O glass or cup in room 513, water pitchers in rooms 512, 514, and 516 were empty and one unit in 516 had no water pitcher. All other pitchers were almost empty and only one pitcher

was filled with water containing ice. In room 511, two (2) soiled bedpans were on the floor. The medication cardex showed many medications had not been given; nursing care plans were incomplete and the vital sign book had no recording since January.

A patient, Rabbi Sobol was awake and got out of bed to talk to the representatives when they entered his room. Initially his speech was very fast, garbled and unintelligible. Mrs. Bush stated that he was disoriented. After a few minutes Rabbi Sobol was able to speak clearly and coherently. He was fully mobile and moved and walked about freely and easily. He appeared anxious and agitated as he told the representatives that he was not allowed to go outside of the home at all even though he was capable of doing so. He also spoke about his house and was concerned about the disposition of his property. He complained about the food in the facility stating that it was not to his taste. He insisted that Mrs. Bowen write the repesentatives names on paper and where they were from. He took this piece of paper and put it in a book on his bedside table. He asked the representatives to help him and his wife get out of this home. His wife is a patient on the same floor and according to the nurse is also capable of self care. Rabbi Sobol followed the representatives out into the hall pleading with them to help him get out of this facility. Mrs. Bowen accompanied him back into his room and listened to him for at least 10 minutes. He was very reluctant to permit her to leave.

A review of Rabbi Sobol's chart revealed the presence of an application to the Home for the Jewish Aged. No social service notes were on the chart.

Rabbi Isiah Sobol's clinical record revealed that there was an order for a Kosher Diet and force fluids which did not appear on the Nursing Care Plan. The medication record indicated the patient did not receive Mellaril 15 mg. T i d on March 6, 9, through March 13, 15, 16, 17, 1974. The order was changed to Mellaril 25 mg. T i d on March 17. There was no indication on the record whether it was obtained or given. Although the physicians order was for "force fluids-water and juices" there was no current intake and output record on the chart. Nurses notes stated that Rabbi Sobol frequently requested fruit juice for constipation but that fruit juice was not available.

In Room 512, Mrs. Gerard, a 64 year old patient was observed lying in bed clad only in underpants. The bedclothes were in disarray and one bedside rail was down. Mrs. Bowen spoke with Mrs. Gerard who was unable to respond to questions such as "how are you?", and "do you know where you are?" Mrs. Gerard responded by spelling her first name which is Elodie. This patient appeared very sluggish and drowsy. There was not water on her bedside table. Mrs. Bush put a gown on the patient, explaining that Mrs. Gerard frequently disrobed.

Mrs. Gerard's clinical record revealed that she was admitted to Town Court Nursing Home on May 3, 1973 from Albert Einstein Medical Center Psychiatric Unit. Her diagnosis at Albert Einstein was Depression. The initial physical examination done at Town Court stated a diagnosis of Cerebral Arteriosclerosis. The discharge summary from Albert Einstein stated that this patient was an Alcoholic and

had had a previous admission to their Psychiatric Unit.

Upon questioning, Mrs. Bush, L.P.N., stated that Mrs. Gerard was usually a lively interested individual who participated in many activities in the home and was very well liked by the other patients. She stated that in the past month Mrs. Gerard had "failed" and was withdrawn, disoriented, frequently disrobed and attempted to climb out of bed, and that her food and fluid intake was poor. She sometimes wandered around the 5th floor at night.

A review of the clinical record revealed that Mrs. Gerard had been under the care of Dr. Gottlieb. On February 27, 1974 she was seen by Dr. Schwartz because she apparently had an upper respiratory infection. Doctor's progress notes indicate her temperature was 101 degrees and her pulse was 120 at that time. No respiratory rate was recorded. The only temperature recorded on the record was in May 1973. Dr. Schwartz wrote an order for Robitussin and an order to take all vital signs 4 times daily for 4 days. No record of any vital signs was found on the clinical record or the vital sign book. However, the order had been transcribed onto the medication sheet and initialed in the appropriate spaces by a nurse. On February 28, 1974, a verbal order was written on the Doctors order sheet to transfer Mrs. Gerard to the service of Dr. Kramer. The Verbal order had not been co-signed by Dr. Gottlieb. On March 1, 1974, progress notes written by Dr. Storey stated the patient had a Upper Respiratory Infection, Tracheo bronchitis, Dehydration, and possible Electrolyte Imbalance. He ordered Tetracycline, force fluids, water

and juices, discontinue Lasix and discontinue Mellaril. Nurses notes on March 1 stated only that fluids were forced and patient slept all day. No intake or output record was kept. On March 2, 3rd, Tetracycline was charted as given intramuscularly; it had been ordered by mouth. On March 3, 1974 the patient was sent to Graduate Hospital of the University of Pennsylvania because of her upper respiratory infection. A note from the hospital signed by Dr. Freedman stated that Mrs. Gerard had Laryngitis, Bronchitis, and moderate dehydration. A prescription for Pen VK was returned to Town Court with the patient the same evening. No nurses notes were written from the time the patient was sent to the hospital until March 7, 4 days later, on the 11-7 and 3-11 tour of duty.

On March 4, Dr. Adelman discontinued the Pen VK which had never been given, and ordered Tetracycline continued which was not recorded as given. He ordered fluids pushed to 2000 cc per day. No record of any intake was available on the clinical record. On March 17, Thorazine was ordered by Dr. Kramer.

The Nursing Care Plan for this patient stated only that the patient's status was stationary; the block marked "withdrawn" had not been checked. No other information was on the nursing care plan.

Nursing summaries were incomplete and lacked any information indicating the patient's real condition mentally, physically or emotionally. One nurse's notation on the night tour of duty stated that the patient had been restless and walking around requesting food and drink, but no food or juice was avail-

able. No nursing assessment had been recorded. Doctor's progress notes dated September, October, November and January were illegible.

Fourth Floor—Census 39

3-11 Charge nurse Mrs. Clark—Aides

11-7 Charge nurse Mrs. Williams—L.P.N. (W)

Mr. Slusser conducted a tour of the 4th floor. There was a notable odor of urine upon entering the lounge area from the elevator. Mrs. Williams, L.P.N. (W) was in charge of the 4th and 3rd floors on the 11-7 tour of duty. She accompanied the representative on complete rounds, and was very knowledgable of all the patients on these areas.

Mrs. Bernard, supervising nurse on 11-7 tour of duty frequently consulted Mrs. Williams in regard to extra procedures and routines, i.e., she asked Mrs. Williams to leave her areas of duty and come to the second floor to identify the proper key to the emergency drug kit.

Medication records on fourth floor revealed that some patients did not receive medications on the following dates, February 11, 12, 13, 14, 18, 20, 25, 27th, March 6, 10, 12, 16, 18, and 19th.

Mrs. Edna Kirkoff was Medicare patient in room 412. She had been admitted to Town Court Nursing Home on February 15, 1974 from Graduate Hospital with a diagnosis of Right Cerebral Vascular Accident, Diabetic. Ulcer of left leg, and Arteriosclerosis Obliterans. The patient had a nasogastric tube in place at the time of admission. On February 24, and March

1, 1974 Mrs. Kirkoff was sent to Graduate Hospital for reinsertion of the nasogastric tube after she had pulled it out. Nurses notes on March 1st indicate that after the tube was reinserted at the hospital during the day tour of duty, and the patient again pulled it out on the 3-11 tour of duty. No nurses notes were written until March 3, 1974 when "tube feeding" was noted.

There was no report of a chest x-ray or urinalysis on the record. The patient did not receive her Mandelamine on March 2, at 6 and 10 P.M. nor her Lanoxin on March 12, 1974. No tube feeding was recorded on the medication sheet on March 1, 2, 6, at 6 and 10 P.M. and on March 12 at 10 and 2 P.M. Betadine was ordered to the ulcer of left leg 2 times a day, however it was recorded on the medication record only 4 times for March.

A nursing care plan for Mrs. Kirkoff was forwarded to Town Court from the hospital. The nursing care plan was as follows:

Stimulate patient by talking to her
Mouth care
Catheter care
Good skin care
Ulcer care
Bath oil, dry skin
OOB b.i.d., try diversion
Posey mitt to hands, remove T.i.d.
Naso-gastric Tube
Watch for impaction, sit up hi—fowlers for feeding.

The nursing care plan at Town Court read as follows:

"Return to A D L, Needs full nursing care, needs to be oriented."

Jennie Bradley was a medicare patient in room 412. She is 79 years old and was admitted on January 25, 1974 from St. Agnes Hospital. The nursing care plan from the hospital read as follows:

Encourage to feed using extremities assist ambulating due to vision and balance, wear neck brace OOB, cervical collar in bed

soft diet

ROM Therapy

commode after breakfast

watch for decubiti after brace is removed

There was no nursing care plan for this patient at Town Court. Nurses notes stated "routine care." There was no discharge summary on the record. The patient's temperature had not been taken since admission on January 25, 1974.

Third Floor—Census 39

3-11 Mrs. Booker, LPN—charge nurse—aides

11-7 Mrs. Williams—2 aides

A tour of third floor was made by Mrs. Bowen accompanied by Mrs. Booker, LPN. In rooms 214, 317, and 320 there were no drinking cups; there was also a strong odor of urine. Soiled bedpans were on the floor in patients rooms. In room 320 a Foley Catheter drainage bag was lying on the floor. In room 307, two (2) bedside units lacked water pitchers. Water pitchers were almost empty and

none contained any ice. External drugs i.e., eye drops and nose drops were unlocked at the nurses station.

Nursing Care Plans were either not done at all or incomplete. Medication sheets dated October and November 1973 were loosely piled on the desk at the nurses station.

A review of the medication records revealed that on March 12 and 17, 1974, no medications had been given on the 3-11 tour of duty. There was no record that Insulin had been given to Joshua Williams on March 10, 11, 1974. Valison ointment and Benadryl ordered for Mrs. Helen Davis on March 14, were not started until March 17. No medications were recorded as given to Dora Vashen on March 6, 1974, or to Thomas Butler on February 27.

The tour was concluded with a visit to the Dietary Department by Mrs. Steever, Mrs. Bowen and Mr. Slusser accompanied by Mrs. Bernard supervising nurse. A large bowl of eggs was found unrefrigerated. Since there was no juice available on any patient floors, Mr. Slusser advised Mrs. Bernard to take a can of orange juice which was stored in the breakfast cart. Mrs. Bernard picked an opened can of juice, but Mr. Slusser urged her to take a full unopened can, which she did with some reluctance.

Sanitation in the kitchen was satisfactory. Food stores were locked and could not be surveyed.

A special visit was made to this facility by Mrs. Madeleine Bowen, R.N. Field Representative and Mr. Jack Slusser, R.N. Assistant Supervisor Standards and Licensure, Department of Public Welfare and Mrs. Marjorie R. Steever, R.N. Survey Validation Officer, Division of Licensure and Certification,

Department of Health on the night of March 19, 1974, and by Mrs. Phoebe Somma, R.N., and Mrs. Mary P. Berman, R. N., Field Representatives, Department of Public Welfare Division of Standards and Licensure on the morning of March 20, 1974.

The purpose of the visit was to investigate regarding a patient care complaint and follow-up on the 2567 (B) corrective action taken. As indicated in the attached summary this facility has had on numerous survey visits patient care deficiencies which represents a hazard to the health and safety of the patients within the facility. A post-certification revisit report and certification and transmittal is attached for the March 19, and 20, visits.

A recommendation for termination of the provider agreement is being made.

March 18, 1974

Subject: Town Court Nursing Home
To: File

From: Madeleine S. Bowen, R.N.
Field Representative
Standards and Licensure

Mrs. Philomena Shewcheck a complainant was telephoned on March 15, 1974 and asked to write her complaint and be more specific as to the charges of negligence, inadequate care, inhuman and degrading treatment.

Mrs. Shewcheck replied she is very burdened at home at present with an ill husband and father-in-

law and will try in the near future to write to the Department of Standards and Licensure specifically stating her complaints.

Mrs. Shewcheck said she did not want to become involved today. She stated that the patient Wanda Nefka, had died after being transferred from Town Court to a hospital where she laid 7 1/2 hours before being identified. She said that another patient at Town Court was refused water because she was incontinent.

Mrs. Shewcheck concluded the conversation by saying she would write to this office in a week or two.

March 22, 1974

Subject: Town Court Nursing Center
To: File

From: (Mrs.) Phoebe Somma, R.N.
(Mrs.) Mary Berman, R.N.
Field Representatives
Standards and Licensure

A special unannounced visit was made March 20, 1974 to Town Court Nursing Center by Field Representatives Mary Berman and Phoebe Somma; following the unannounced night visit of March 19, 1974.

Mr. Thomas, acting administrator accompanied Field Representatives and Mrs. Gross, R.N. Director of Nursing Services joined the surveyors during the tour of patient care areas.

Fifth (5) Floor

Census 34—staffed by one (1) L.P.N. (waiver) and two (2) nurses aides.

Mrs. Adelman, a patient in Room 509 was of serious concern to surveyors; this concern was also evidenced during the special unannounced visit made the previous night (see previous report). Review of her clinical record on March 20, 1974 revealed the medication, ampicillin, had been secured from the Pharmacy. Although the medication label was dated March 19, 1974 there was no documentation that the prescribed dose of ampicillin (ten (10) cc every six (6) hours) was given until 12 noon on March 20, 1974. The L.P.N. on duty stated she did not know why the medication was not given as ordered. Patient's temperature recorded as (104) (R) at 8:00 A.M.—100 (R) at noon. Intake and output was recorded from 8:00 A.M. until time of visit (12:30 P.M.)

Mrs. E. Pennington, patient in Room 501, admitted March 15, 1974, verbalized complaints involving rough handling and verbal abuse by staff members; no particular personnel named. Clinical record reviewed to ascertain prescribed medications and treatments. Verbal physician's orders revealed an order for insulin, Colase and a sitz bath treatments. Insulin and colase were charted as being given but no record of sitz bath treatment. While conversing with patient, her daughter brought in two bottles of medications, which the patient had been receiving at home on a daily basis (Dilantin and Urecholine). These were given to Mrs. Gross, R.N. by the patient's

daughter. Neither of these medications appeared on physician's order sheet.

Fourth (4) Floor

Census 39—staffed by one (1) L.P.N. (waiver), four (4) nurses aides.

Very offensive odor of urine permeated the entire floor.

Clinical record of Amaza Smith revealed medication had not been

Third (3) Floor

Census 39—staffed by one (1) L.P.N. (examination) and four (4) nurses aides.

Viola Thomas in Room 309 was observed to be having difficulty eating her lunch. Upon investigation the patient stated she was partially blind and her fingers were observed to be severely deformed by an arthritic-like condition. She stated she does require assistance with her meals but does not receive it. She further stated the nurses yell and curse at her when she requests help.

Clinical record of Hermin Garfinkle revealed his medications had not been charted as given since March 19, 1974.

Clinical record of Mabel Watson revealed medications had not been charted as given since March 1, 1974.

Second (2) Floor

Census 24—staffed by one (1) R.N. three (3) nurses aides.

Random selection of clinical records revealed no major discrepancies in charting.

Review of closed clinical records in administrator office.

Charles Alexander admitted March 15, 1974 expired March 19, 1974. Physical examination on admission, stated Nutrition was poor, admitting diagnosis Heart failure. Nurses notes were not written at time of admission, nor in chronological order thereafter.

One medication (Lasix 40 mgm O.D.) ordered by physician on admission, was not recorded as being given during the patient's stay. Verbal orders of March 17, 1974 were not signed by physicians. No discharge progress note by physician.

Celia Diamond discharged to Graduate Hospital on March 18, 1974.

March 13, 1974 nurses notes stated patient fell hitting the back of her head resulting in a laceration. She was sent to Graduate Hospital for X-rays and sutures. The next entry in nurses notes on March 18, 1974 stated patient appears very pale and lethargic, slurred speech, temperature 102, and vomiting and bile colored fluid. Transferred to Graduate Hospital with all her belongings.

In reference to a complaint received in Regional Office on March 15, 1974, Wanda Meks's clinical record was reviewed, patient was admitted January 3, 1974 with a diagnosis of arteriosclerotic, cardiovascular disease, chronic heart failure, and diabetes. No significant nurses notes until January 17, 1974, at which time note stated patient looks poor vital signs: no pulse, respirations 43. B/P 120/60. Dr. Nathanson notified instructed nurses to give Lasi 40 mgm i.m.

Next entry stated—patient transferred to Presbyterian Hospital where according to complainant she expired. No progress notes by physician except one entry which states "see P.E.". No intake or output recorded despite diagnosis and diuretic medication order.

Following this visit and reviewing the above facts it is the opinion of the surveyors that the care rendered to the patients in this facility is jeopardizing their health and safety.

PS:MB/lg

(s) Mary P. Berman, R.N.
(s) Phoebe Somma, R.N.

Town Court Nursing Home
March 20, 1974

A special visit was made to this facility by Mrs. Madeleine Bowen, R.N. Field Representative and Mr. Jack Slusser, R.N. Assistant Supervisor Standards and Licensure, Department of Public Welfare and Mrs. Marjorie R. Steever, R.N. Survey Validation Officer, Division of Licensure and Certification, Department of Health on the night of March 19, 1974, and by Mrs. Phoebe Somma, R.N., and Mrs. Mary P. Berman, R.N., Field Representatives, Department of Public Welfare Division of Standards and Licensure on the morning of March 20, 1974.

The purpose of the visit was to investigate regarding a patient care complaint and follow-up on the 2567 (B) corrective action taken. As indicated in the attached summary this facility has had on numer-

ous survey visits patient care deficiencies which represents a hazard to the health and safety of the patients within the facility. A post-certification revisit report and certification and transmittal is attached for the March 19, and 20, visits.

A recommendation for termination of the provider agreement is being made.

ATTACHMENT 2

Subject: Town Court Nursing Home
To: File

From: (Mrs.) Madeleine S. Bowen, R.N.
Standards and Licensure
Field Representative

Summary:

An unannounced licensure visit was made at Town Court Nursing Home on May 9, 10, and 15, 1974. Mr. Jack Slusser, R.N., Mrs. Mary Berman, R.N. and Mrs. Madeleine Bowen, R.N. conducted the survey. Mr. Thomas, Administrator, Mrs. Moody, Assistant Administrator, and Mrs. Gross, Director of Nursing, accompanied and assisted the surveyors.

On April 3, 1974 this facility received a certified registered letter citing 26 deficiencies found at the time of an unannounced night visit on March 19, 1974. A thirty (30) day period was allotted to the facility to provide time for those corrections needed in order to meet full compliance with the State regulations.

The survey revealed that some deficiencies had been corrected. Mr. Thomas had a temporary administrators license and had taken the administrators examination. Disaster Plans had been posted, linen supplies were increased, call bells were available many more medications were being charted and more nursing care plans were available.

Major deficiencies continued to exist in staffing, nursing care, medications, clinical records, physicians orders and in the dietary department. The census remains at 138 and in the past 5 1/2 months 65 patients had been transferred to hospital, 19 had expired, and 26 had been sent home or to other nursing homes. Because of the unusually high number of hospital admission, 26 closed records were reviewed and it was revealed that only 2 of 20 patients were transferred or discharged with a physician's order. Two (2) bodies had been removed from the facility before pronouncement of death by the physician. One (1) clinical record contained no pronouncement of death.

It was also discovered that on April 28 telephone verbal orders were received and signed "Carol Fertig, R.N." although Miss Fertig did not work on that day. The writing appeared to be that of F. Lohier a registered nurse currently unlicensed in Pennsylvania. Ms. Lohier's name did not appear on any time schedule.

The problem of poor nursing care suggests that daily rounds by Registered Nurses are not being done and therefore no professional nursing assissments are made. This ultimately results in the practice of corrective rather than preventative medical and nursing

care inadequate supervision and direction of nursing personnel. Such problems as dehydration and fecal impactions are preventable by careful nursing observation and nursing intervention, neither of which is in evidence in this home.

Changes in patients conditions are not noted until those changes have resulted in some acute condition necessitating medical intervention.

In addition to the poor quality of professional nursing supervision the nursing staff is deficient in quantity therefore compounding the problem. It is the contention of the Director of Nursing that the patients are showered and kept clean. That alone is not the only goal of geriatric care. The number of males needing shaves seems to be a result of inadequate staffing.

Nursing personnel other than R.N.'s are oriented by their peers. They were not aware of the meaning of an ADA diet or the significance of "double" on a patient's tray.

The dietary department had glaring deficiencies particularly in the area of therapeutic diets. Of eleven (11) patients on fifth (5) floor ordered to receive therapeutic diets, only five (5) were receiving them. On May 9th the luncheon entree of "sloppy joes" was insufficient in quantity to serve all the patients and other substitutions had to be made. A tube feeding was being prepared with the syrup from canned fruit, milk, and eggs.

Complaints received in the Regional Office about cold food and hungry patients were substantiated.

Observation of lunch being served revealed that food stands on carts from 5 to 25 minutes while nurses aides pour coffee and milk and put condiments on trays. No heating devices are available to maintain warmth.

Upon questioning several patients stated they were often hungry but additional food was never available. Almost every bedside cabinet had supplies of cookies, crackers and candy supplied by families. One (1) male patient refused to offer any comments about the home stating "I'd be a fool if I complained".

Water pitchers were dirty, water was not fresh there was no ice in any pitchers; some patients had no water pitchers or drinking glasses.

Mrs. Baur, a patient on third (3) floor complained to a surveyor about the inhuman treatment and verbal abuse. Several telephone and written complaints have been received in the regional office concerning the treatment of patients in this facility.

The exit interview was conducted with Mr. Thomas, Mrs. Moody and Mrs. Gross. The numerous problems were discussed and the problem of staffing was reviewed. Mr. Thomas and Mrs. Gross stated that obtaining and keeping staff was difficult. Upon questioning Mr. Thomas revealed that he felt personnel policies for nursing staff were poor and felt his own benefits were inadequate. He stated that requests to the corporate office for increased benefits have been denied.

Licensure was not recommended at this time. Mr. Slusser stated that the report of the survey would be turned over to the legal department for action. Both

Mr. Thomas and Mrs. Moody were of the opinion that most of the deficiencies had been corrected prior to the survey. It was the findings of the survey however, that not only new areas of deficiencies but continuing serious deficiencies in nursing. Mr. Slusser pointed out that no request for consultation had been forthcoming from the facility although it had been offered in the letter of April 2.

Mr. Thomas said he would send a formal request for consulation to Mrs. Poppert.

Jun 18 1974

ATTACHMENT 3

June 28, 1974

Summary: Town Court Nursing Center
Survey of June 3, 4, 5, 1974
Provider Number
39-5129

An unannounced survey for the purpose of Licensure, Medicare and Medicaid, was done at Town Court Nursing Center on June 3, 4, 5, 1974. Participating surveyors were Mrs. Barbara Faillace, R. N., Mrs. Madeleine Bowen, R.N., Mrs. Phoebe Somma, R.N., and Mrs Mary Berman, R.N., Mrs. Marjorie Steever, Medicare Validation Officer, Harrisburg also participated in the visit.

The license for this facility expired on March 22, 1974, and no recommendation for licensure has been made by the Regional Office of the Department of Welfare.

Several extensions of time have been granted to Town Court in order to provide this facility the opportunity to come into compliance with state regulations.

On April 2nd, 1974, Mr. Thomas, Administrator received a letter and a list of violations by certified mail. A thirty (30) day period ending May 4, 1974, was granted to correct existing deficiencies. An offer to provide consultation was included in the letter but was not acted upon by Mr. Thomas. Notice was given that the next survey would be unannounced.

On May 9, 10, 15th, an unannounced licensure survey was done and because substantial improvement had not been made in the quality of patient care, no recommendation for a license was made.

On May 24th, 1974, a meeting was held in the Regional Office at the request of Mr. Al Casper of Regional Health Planning. He was accompanied by Mr. Daniel Veloric, President of Geriatric and Medical Centers, Inc., and Mr. John Thomas, Administrator of Town Court. Representing the Department of Welfare were Mrs. Dorothy Poppert, Regional Supervisor, Mr. Cecil Maidman, Attorney for the Department, and Mrs. Ruby Buckler, Miss Roseanne Marsicanno, Mr. Jack Slusser, Mrs. Barbara Faillace, Mrs. Madeleine Bowen, and Mrs. Marjorie Steever, Validation Officer, from Harrisburg.

Mr. Casper and Mr. Veloric wished to present long term plans for Town Court as the corporation has been authorized by Regional Health Planning to begin new construction for the addition of sixty (60) beds. The position was taken by the Department of

Welfare that the immediate needs of Town Court were a priority and demanded immediate correction because patients health and welfare were jeopardized.
Jul 5 1974

Mr. Veloric and Mr. Thomas then requested that one (1) week be granted to bring the facility into compliance.

Therefore on June 3, 4, 5th, 1974, another survey was done. Major deficiencies continued to exist in Dietary, Nursing, Housekeeping, and Administration. The Director of Nurses had resigned and Mrs. Carol Fertig Leonard was Acting Director. She was unqualified to carry out the responsibilities of that position. Staffing was deficient qualitatively and quantitatively Improvement had been made in the charting of medications. Overall quality of nursing care was unacceptable. It was noted that Mrs. Fertig Leonard had written a nurses note stating that a physician had pronounced death at 8:30 P.M. on May 21, 1974. Time cards revealed that Mrs. Fertig Leonard was not in the facility at that time. The death certificate gave the date of death as May 21, 1974; the physician dated his signature on April 22, 1974.

Dietary services were grossly inadequate with food in short supply, cold food, diet errors, and therapeutic diets not being served.

Observation of a fire drill revealed negligence on the part of Mr. Thomas who did not seem aware of how to conduct a fire drill. After five (5) minutes he delegated this responsibility to Mrs. Moody, Administrator. Surveyors posted on all floors noted that

there was absolutely no response at all to the announced drill on 2, 3, and 4th floors. Fifth (5) floor personnel responded inappropriately. Documentation of monthly fire drills was provided by Mr. Thomas.

In conclusion then, from April 2nd to June 5th, 1974, conditions at Town Court have not significantly improved, and these conditions adversely affect the health, welfare, and safety of patients.

It was noted at the time of the June survey that construction of the new addition had begun.
MSB/jct

ATTACHMENT 4

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania 19101
September 20, 1976

Office of the
Regional Director
Mailing Address
P. O. Box 13170
Philadelphia,
Pennsylvania 19101
3133

Our Reference: OLTC (1)ew
Mr. Richard Zarin
Acting Director

Division of Licensure and Certification
State Department of Health
Health and Welfare Building
Harrisburg, Pennsylvania 17120

Re: Town Court Skilled Nursing Facility

1526 Lombard Street
Philadelphia, Pennsylvania 19146
Medicare No. 39-5337
Medicaid No. 04-00357

Dear Mr. Zarin:

Our office received a request to investigate a complaint of poor nursing/patient care and improper billing procedures with respect to Medicare patients at the above listed skilled nursing facility.

During the week of July 19 through the 23, 1976, a federal team investigated the alleged complaint and at the same time conducted a complete federal survey of all the health conditions of participation governing skilled nursing facilities.

The findings of the survey substantiate the allegation of poor nursing/patient care. In reference to billing procedures there appears to be some concern and our office will request the Bureau of Health Insurance Integrity Branch to conduct a complete investigation.

The Federal Survey findings are significant in that the following conditions of participation are not met:

405.1122 Medical Direction
405.1124 Skilled Nursing Services

The Conditions of Participation for Physician Services and Dietary Services are marginally met. In addition, the federal findings reveal that many standards and elements throughout the health standards are not met. Moreover, a further investigation needs to be undertaken with respect to medical care rendered at this facility.

The results of the federal survey of July 19-23, 1976, compared with the state survey of April 14, 1976, indicates *serious* and significant differences between the two surveys. The state survey found all conditions, standards and elements met. See the attached federal survey narrative findings.

In accordance with Section 942 of the State Agency Long Term Care Manual, you are requested to conduct a complete resurvey of the Town Court Skilled Nursing Facility immediately. Forward a completely documented survey report form and the appropriate accompanying documents.

Sincerely yours,
(s) Illegible
Robert J. Taylor, Director
Office of Long Term Care
Standards Enforcement

Enclosure

SUBJECT:
Federal Survey Findings
Town Court Skilled Nursing Facility
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Medicare No. 39-5337
Medicaid No. 04-00357
Total Number of skilled beds certified—198
Federal Survey Performed
July 19 through the 23, 1976

Prepared by the Office of Long Term Care, Standards Enforcement, DHEW, Region III.

Narrative Findings

Standards and elements not met including the standards and elements found not met under the Conditions of Participation.

Medical Direction: Coordination of medical care standard (a) F94, F95. There is no evidence that the medical director is involved in the coordination of medical care in the facility. The administrator apparently has attempted to provide some coordination as evidenced by a physicians' staff meeting dated 2/23/75 with four physicians attending and the Medical Director not present. According to the administrator, he initiated the meeting. A memo from the administrator, dated 2/25/76, definitions were established for common terms for patients' conditions such as good, fair, serious and critical, so that when inquiries are made these terms could be used by all; there was no evidence of approval by the Medical Director. The Medical Director has not developed by-laws, regulations, or outlined the responsibilities of the attending physicians. There were no policies/directives with respect to physician services and the provision of services.

Standard (b) *Responsibilities to the facility F98, F99.* The administrator and nursing staff assume the

responsibility for surveillance of the health status of the facility's employees.

With respect to incidents/accidents, there were 106 incident/accident reports reviewed by the Medical Director, with the exception of nineteen. According to the records, the nineteen were dated from 6/7/76 to 7/21/76. The 106 incidents/accidents occurred from the period January 1, 1976.

The situation described above indicates an immediate need to reinforce policies, procedures and to monitor staff and patients in order to provide a safe environment for the patients. At the present time, the facility is revising the incident/accident form and the assistant director of nursing has implemented an on-going study in reference to this problem.

In addition to the above, there is no evidence that the administrator is given appropriate information to help ensure a safe and sanitary environment for patients and personnel.

According to the records of meetings maintained by the facility, the medical director attends the utilization review and the patient care policy review meetings. However, his attendance at the Pharmaceutical and Infection Control Committee meetings raises some concern.

The administrator indicates that the Pharmaceutical Committee meets monthly. The Federal Regulations require at least quarterly meetings. The Medical Director did not attend the Pharmaceutical Committee meetings dated: June 1975, September 1975, February 1976, March 1976, April 1976, May 1976 or June 1976.

With respect to infection control, the administrator stated that the committee meets quarterly; however, the policy of the facility outlines annual meetings. The Medical Director was in attendance on March 3rd and 31st, 1976. There were no other committee minutes.

Recommendation

The medical direction *functions* need to be implemented immediately specifically with reference to coordination of medical care rendered to patients, to prevention of patient accidents, i.e., protection from injury and to provide assurance for a safe and sanitary environment for patients and personnel. The medical direction functions need to be fully coordinated with all other service areas: Nursing, pharmacy, infection control, dietary, specialized rehabilitation, laboratory, etc. The medical director along with the administrator need to review contracts with all the participating hospitals that have entered into transfer arrangements. Temple University, Graduate Hospital, Center City Hospital. Careful policies and procedures must be developed in order to protect both the patient and the facility as it pertains to providing services to patients. There are gross omissions with respect to information from the transferring facility that have the potential for creating a hazardous situation as it pertains to patient care.

Standard (b) is not met. Deficiencies are noted in F 107 and F 109. The following charts have omissions with respect to this standard.

Chart No. 1394, Medicaid admission of June 19, 1976. Old CVA, dehydrated with right sided

paralysis. This patient has an extensive decubitus on the sacrum and coccyx area that has deteriorated and increased in size significantly since admission. The patient is on 24 hours hypodermoclysis solution containing Wydase (medication). Transfer information as of July 23, 1976 has not been received by Town Court. The patient was transferred from Germantown Hospital. Nursing staff members report only a "piece of paper came with patient," (they cannot locate the information for the federal surveyor). The *only* laboratory results is dated July 21, 1976 of the results of the culture and sensitivity of laboratory specimen from the decubitus ulcer—Proteus microbilas. As of July 23, 1976, there is no history or physical examination. There is a medical care plan dated June 24, 1976. However, this contains only diagnosis, discharge plans, etc.

Chart No. 1181 Medicaid admission September 12, 1975, The physical examination was dated *November 15, 1975.*

Chart No. 998 Medicaid admission. There was no physical examination on the patient's record except one dated 10/24/74.

Chart No. 1160 Medicaid. CVA with hemiplegia. The last physical examination was dated July 21, 1975. The laboratory report of February 13, 1976 showed RBC 3.47 (4.6N), Hb 9.9 (14-18), HCT 32.2 (40-54). There are no additional laboratory reports.

Chart No. 1341 Medicaid. CVA with right hemiparesis, pneumonia. The laboratory report dated February 27, 1976, showed Hb 11.6 (14-18) RBC 4.30 (4.6).

Chart No. 1077 Medicare admission of February 6, 1976. Old myocardial infarction—senile. The last physical examination was dated February 7, 1975. The laboratory report dated December 23, 1975—RBC 3.80 (4.6-6.2) Hb 10.2 (14-18) HCT 30.9 (40-54) no follow-up laboratory report.

Chart No. 1161 Admission July 17, 1975, Right Hemiparesis—old craniostomy. Medication order of June 17, 1976:

—Darvocet N 100 mgm q 6 hours prn for pain
— Diazide cap 1 daily
— Tylenol tab 11 g 6 hours
— P.O. Dilantin 100 mgm t.i.d.
— Haldol 5 mgm B.i.d.
— Vitron C tab 1 daily
— Dalmane 30 mgm at HS prn
— Phenobarb 30 mgm in a.m. daily
— Phenobarb gr 1/2 h.s. prn.
— Surfax 240 mgm at h.s.
— Surbex tab 1 6 p.m. if oral medicines refused, sparine 75 mgm, thorazine 50 mgm at H.S.

On June 24, 1976, the physician's progress report read, patient is over-medicated. Heart shows tachycardia, Lungs clear. Slight ankle edema. On 6/24/76, the following medications were discontinued: Thorazine H.S., Haldol b.i.d., Phenobarb H.S. The laboratory findings not within the normal range lacked follow-up reports. A review of the patient's drug regimen might have prevented over medication.

There were ten (10) patients ordered restraints prn., three of these did not indicate the type of restraint to be applied.

Federal regulations require that the physician prescribe a planned regimen of total patient care based on a medical evaluation of the patient's immediate and long-term needs. The medical evaluation of the patient is based on a physical examination done within forty-eight hours of admission unless such examination was performed within five days prior to admission. In spite of the fact the facility's physicians are reviewing the patient every thirty days, there are omissions as outlined in the charts reviewed and cross referenced with the nursing services. Better coordination with physician services should be implemented.

Recommendations

The condition of participation in reference to physician services is marginally met. Moreover, the requirements under Medical Direction have a direct relationship to the problems encountered under physician services.

The facility needs to implement immediately the requirements outlined under medical direction. Closer monitoring of physician services, accident prevention and surveillance of employee health status needs to be significantly improved.

Analysis of Nursing Care—See attachment

A full direct Federal survey was performed at the Town Court Skilled Nursing Facility during the entire week of July 19-23, 1976. The purpose of the survey was to investigate a complaint in reference to nursing and general patient care. Sixty-six (66) records were reviewed in conjunction with direct observations and interviews with patients. Twenty-seven (27) of the Sixty-six (66) charts reviewed, and nursing observations made, raise concern with respect to

some aspect of nursing/patient care. This represents Forty (40) percent of the sample size of Sixty-six (66).

Twenty-three (23) Medicaid—Four (4) Medicare (*i.e., the twenty-seven that have areas of concern*)

The direct Federal survey reveals the following in reference to nursing and patient care:

Of the Twenty-seven (27) records reviewed, there were six (6) incidents of patient falls, one patient experienced two (2) falls (Chart No. 1272). This patient fell on 1/6/76 at 3:30 P.M. (a gash on the top head). This patient fell while going to the bathroom. He was transferred to Presbyterian Hospital and returned at 10:30 PM. On 7/20/76, at twelve midnight, patient fell while getting out of bed. Patient was semi-conscious at the time. Orange juice was given. The Rescue Squad came and administered IV 50cc of Dextrose. Patient responded at once. (No record of vital signs indicated.) On 7/21/76, at 4:30 AM vital signs T 98.6, P-76, -24 and B/P 140/70. A nursing note indicates patient did not eat. The attending physician was notified. 10:30 A.M. physician's note, "abrasions of head, forehead and nose. Quiet respirations. Comfortable. Bedside blood sugar low." One of the six incidents resulted in a patient sustaining a fracture of the left distal radius as noted by the referring physician at Graduate Hospital on 7/15/76. The patient was transferred to Graduate Hospital because of bruising and swelling of the left lower arm. (Chart No. 402.)

In addition to the above concern for patient safety, the review of the Twenty-seven (27) records discloses a pattern of a lack of (1) thoroughness in charting pertinent observations, particularly with respect to observation and healing status of decubitus ulcers. The majority of nurses' notes only indicate if a treatment was done, more seriously observations reveal that (2) nursing assistants are primarily responsible for the special treatments to decubitus, i.e., cleaning, application of topical medications and for foley catheter irrigations including the introduction of medicated irrigating solutions and other special treatments. One particular observation of an aide reveals improper aseptic technique was employed in doing the decubitus care and foley irrigation. Moreover, the aide did not follow the facility's procedure and informed the surveyor that she observed another aide as opposed to receiving instructions and demonstration and supervision from the licensed nursing staff. (See attachment), (3) In certain instances, where it is appropriate, there are omissions in reference to total and types of food tolerated and consumed by some of the diabetic patients and for the one patient who has a large non-healing decubitus. This patient is on IV hypodermoclysis with Wydase added.

All of the above results in a pattern of poor nursing care as it relates to monitoring patients, preventing accidents, careful follow-through of nursing care, lack of direct supervision of aides, assignment to aides of procedures that should be performed by the licensed staff. This pattern of nursing care delivery, particularly the concerns raised in the 27 records, has a potential to jeopardize the health and safety of patients.

An additional occurrence of July 23, 1976 raises further concern, although the charge nurse indicated that it was a very unusual situation. The laboratory technician was late arriving to the floor to obtain the Fasting Blood Sugars from approximately eight (8) diabetic patients. The breakfast trays were on hold. Hot foods, i.e., scrambled eggs and toast were lukewarm to cold when Federal surveyor observed the delay. These trays were not contained in warmers. Patients finally started to receive trays between 9:15 and 9:30 A.M. The laboratory technician completed her activities at 10:10 A.M.

One patient complained later she did not receive a tray.

Based on the above (See narrative attachment) standard (c) of 405.1124 is not met. *It is the pattern of nursing care observed as revealed in the 27 records that renders the condition of Participation 405.1124 not met.*

Patient Identification No.

1. No. 402—Medicaid
   Admission 5/2/72
   Primary Diagnosis: left fracture—neck of left femur (?) ASHD
   Current physical dated 11/9/75

On initial day of survey, Federal surveyor observed an elderly female neatly dressed in a colorful nightgown lying in bed. The patient's left lower arm was bruised and an ace bandage was applied. The left hand was swollen. The patient's arm rested to the side There was no suport, i.e., a sling. The charge nurse indicated the swelling was essentially as it had been on previous days. She indicated the

patient received special soaks and would be followed at Graduate Hospital. On 7/20/76, another Federal Surveyor observed swelling of the patient's left hand. The 3-11 supervisor visited the patient. Indicated the ace bandage was tight. The physician's note of the day also indicated ace bandage was tight. The evening supervisor indicated ace bandage would be adjusted and a sling applied. Next A.M. (approximately 9 A.M.), Federal surveyor saw patient. Patient indicated she bathed self with assistance from the aide, this A.M. Stated she did not eat breakfast, only orange juice. Her complaint was, toast is always a little burnt. Charge nurse observed ace bandage, still applied incorrectly, no splint applied. Aide assigned to soaks. Federal surveyor observed aide and interviewed her in reference to the treatment. The patient indicated aide was doing a good job. Patient was out of bed. On return to facility, at approximately 1:40 P.M., Federal surveyor notified that the patient expired suddenly. The physician indicated as an immediate cause of death, "myocardial failure (heart failure) 5-10 minutes and arteriosclerosis 2-3 years." He also ordered an autopsy. The evening supervisor informed the Federal surveyor that an autopsy is not performed when natural cause of death is listed. The attending physician was not available; however, a message was given regarding this.

Review of record reveals the following:

7/11/76

Patient's left hand is edematous. Physician's answering service called. Physician ordered hand soaks in Epson solution.

7/11/76

Verbal order taken by RN and signed by the physician. Soak left hand in 2 tsp. of Epsom salts to one pint of water three times a day. Keep hand elevated.

7/12/76—Physician's note:

"Patient presumably fell one week ago and injured left hand, no tenderness—no chills—fever. Soaks ordered" (NOTE: some words in this notation cannot be discerned by the Federal surveyor).

7/12/76—Nurse's note:

7-3 shift, left hand swollen, soaks to left hand done, visited by physician.

3-11 shift, left (hand) soaked, as ordered, with normal saline solution. (On 7/12/76, physician ordered normal saline solution soaks.)

7/13/76

7-3 shift, left hand still swollen, soaks, hand elevated in sling.

7/15/76—Physician's note:

Hand swollen, but less. Sling ordered. Burrow's solution.

7/15/76—4:30 P.M. Nurse's note:

Message left at relative to inform them of fracture. 3-11 Patient returned from Graduate Hospital 7/15/76 written on prescription sheets. Not signed by referring physician. Physician's name was contained in content of order, i.e., in reference to who to notify if there are problems.

7/15/76—Nurse's note:

"Patient transferred to Graduate Hospital via cabulance at 3:15 P.M. Returned at 5:25 P.M. No apparent distress."

Prescription sheets (2) state:

(1) distal radius fracture non-displaced
(1) encourage finger motion
(2) Check neuro vascular status regularly left hand
(3) remove ace bandage daily to care for skin on dorsum of forearm
(4) call Dr. Kimbin? if any questions
(5) to be seen in 2 weeks

7/16/76—Nurse's note:

"Patient's arm still swollen, denies pain. Bruising throughout forearm to the elbow. Encouraged to move fingers. Ace bandage removed and rewrapped. Patient's fingers checked, feels pain, color good, warm to touch, nail beds, appears normal," etc.

Treatment to lower left arm not recorded by Nursing Service on 7/16/76

7/18/76—Physician's order:

Sling to left hand
x-ray, D/C Saline soaks
Use Burrow's solution

7/20/76—Physician's note:

"Splint seems to suffice . . . swelling—wrist, ace bandage too tight"

7/20/76—Nurse's note:

Patient's arm swollen, (better) no complaint of pain.

7/21/76

Federal surveyor saw patient in A.M. Wrist swollen but less than 7/20/76. As noted in afternoon, ace bandage not applied correctly. House supervisor removed and asked aide to bathe and apply

treatment. Federal surveyor briefly observed patient receiving treatments this morning.

7/21/76—No time listed—Nurse's note:
Patient found lying down—unresponsive VS P(0), R(0), B/P (0), Temp. 94, Dr. notified

7/21/76—1:30 P.M. Physician's note:
Patient expired 1:30 P.M.
Autopsy ordered
Death Certificate signed
Immediate cause of death Myocardial failure 5-10 min.
Arteriosclerosis 2-3 years
Federal surveyor notified by 3-11 supervisor that State does not perform an autopsy when natural causes are given for death.

Incident form dated 6/24/76
The appropriate blocks in reference to notification of physician not checked. Vital signs, 98T, P-70, R-no record. Description of incident, laceration on arm, 2nd bruised spot on left knee. Treatment, ice pack given; placed on left knee and left arm, dressing after cleansing with hydrogen peroxide. Question on form: How to prevent accident. Response from aide: "We cannot because patients are subject to falls," signed by floor nurse and Director of Nursing, not by Medical Director.

2. *No. 1317—Medicaid*
Admission 2/13/76
Chief Complaint—Chronic UTI
Primary Diagnosis: CVA, Chronic Brain Syndrone
* Poor mouth care
* Good care plan

3. *No. 1408—Medicaid*
Admission 7/15/76
Chief Complaint—Recurrent GI bleeding, lower abdominal cramps, severe anemia

Physician's note: Severe anemia 2° GI bleeding aggravating a known refractory anemia due to bone marrow failure. H & H stabilized at 8-9.

7/20/76—Nurse's note: . . . "Patient sustained fall to the floor, no evidence physician notified
Lab results 7/20/76
RBC 3.37 L
Hg 9.7 L
Hct 29.5 L

Doctor notified of results 7/22/76"
In bed when Federal surveyor went with charge nurse to observe patient.
Good Care Plan

4. *No. 1064—Medicaid*
Admission 1/7/74
Note 7/15—Patient fell from wheelchair, T 98, P-60, R. 18, B/P 130/70. Supervisor notified. No documentation in reference to notifying physician.

5. *No. 1352—Medicaid*
Referred from home
Date of Admission 3/24/76
Diagnosis: Diabetes, CVA
Review Lab results:
7/3/76 Glucose 82
4/9/76 Glucose 63
7/16/76 Glucose 170 High
On a 1500 ADA diet

There are notations in reference to feeding and assisting with meals, no description of diet tolerance or consumption.

6. *No. 1135—Medicaid*
Admitted 5/20/75
Admission physical examination 11/5/75
Diagnosis: Diabetes Mellitus
Nurse's notes reveal:

6/8/76
Patient took milk and crackers—urine negative with trace of acetone, still feels weak—encouraged to take fluids.

6/8/76 patient feeling much better, ate entire serving of diet supper, would like to have soup at supper, notation for dietitian.

6/8/76—4:30 P.M. insulin held because of complaint of weakness and dizziness.

6/26/76—1600 ADA 1/5, 2/5 including 3 P.M. snack, 2/5 including hs snack

6/30/76—Complaint of weak and dizzy. Patient got up from chair, attempted to get to bed, slipped and fell to floor. No visible injuries. No complaint of pain. Vital signs B/P 180/90, T-98, P-76, R-20 awaiting for physician to return call.

9:20 P.M. telephone call from physician, stop all medication, will see patient tomorrow.

No apparent distress.

7/1/76—Patient weak, dizzy
Doctor examined patient, to remain in bed today, all meals stopped.

7/1/76—Patient lethargic and pale, B/P 160/80-80-20
Doctor notified. Additional insulin dosage given.

7/5/76—FBS 156, physician notified

7/8/76—insulin changed per assessment and visit by physician.

7/12/76—physician notified of increase in Blood sugar, insulin increased by physician.

7/19/76—FBS 152

7/21/76—insulin reaction noted, VS 166/120-98-20 OJ and sugar P.O. time not noted by licensed nurse

7/21/76—3-11
"Patient appears drowzy, lying in bed most of shift. Ate good dinner. Statement of patient (patient feels better) insulin given by supervisor this evening."
Chromology of Lab studies:

6/25/76 Fasting Glucose 162

7/ 2/76 Fasting Glucose 156

7/ 9/76 Fasting Glucose 204

7/16/76 Fasting Glucose 152

No Registered Dietitian's notation on chart in reference to diet tolerance or consumption or if any problems discerned.

Patient apparently unstable with respect to Diabetes.

On Patient Care Plan there is a notation in reference to nursing approach to Diabetes.

"Patient to give own insulin—reinforce technique in class."

There is no current physician's order regarding this although there was an update of plan, July 2, 1976.

7. No. 952 Type 2

Admission 5/20/75

Current Hx and physical examination 5/21/76

From current information: Diagnosis: Bilateral A/K amputation, Glaucoma, Diabetes Millitus

* Nurse's note:

7/16/76 by RN "Patient has not had an eye examination *2 years*. Federal surveyor questioned nurse regarding this.

Eye appointment has been scheduled for August 13, 1976.

8. No. 1402 Medicaid

Admission 6/20/76

Diagnosis: Congestive heart failure

Diabetes

Has decubitus on admission

Location: Left hip, 1 cm in diameter—approximately inch, healing.

Aides responsible for treatment to the decubitus and left stump area.

Treatment to decubitus: Paint on left hip with 5% mercurochrome, allow to dry. Apply BFI powder bid.

Aide applying topical medications. Indicated she received no instruction with respect to treatment.

Aide used H_2O_2 solution used for other patients. Poor technique, held bottle opening close to decubitus while pouring solution to clean skin area.

When aide turned patient, sheets very ruffled, crumbs in bed, spoon under patient, coffee cup dirty with deep staining. Aide indicates she usually checks

cups before serving, but forgot this one. Indicates kitchen sends cups up like this one frequently.

On physician's order sheet there is an order between dates of 7/7/76 and an order of 7/21/76 for weekly FBS unless otherwise ordered. 7/2/76 FBS 140 high. There are no other FBS results on record.

There is an R.D. notation 7/20/76—1500 cal. ADA pureed diet, must be fed, appetite fair.

9. No. 1394—Medicaid

Admission 6/19/76 from Germantown Hospital.

No transfer information received.

Admission note by LGPN 6/19/76—"Received patient this PM from Germantown Hospital via ambulance. Dehydrated OLD CVA with right paralysis, vital signs taken.

Decubitus on Sacrum/Coccyx, left heel.

House supervision indicates decubitus twice size since admission. A heel cushion is applied.

Description of Decubitus on Sacrum/Coccyx low spine.

Approximately 2 inches in diameter and 1½ inch deep. No signs of healing, outside tissue red, inside decubitus tissue has grayish/whitish appearance.

Result of recent C & S of decubitus Lab report verbal, 7/21/76. Proteus Mirobilas S-Senitive Kanamycin and Ampicillin. Physician ordered Ampicillin 500 mg. q 6°.

There is no complete Hx, PE on record. The only lab report is the above listed report of 7/21/76, it was ordered 7/17/76. Patient previously on Keflin 1.5 gm. Im q 6° as of 7/17/76. I/O is recorded

and food consumption is described in terms, appetite fair. Nothing recorded by RD about diet intake as it pertains to protein consumption. Nothing recorded in reference to type of foods consumed. Nurse's notes do not contain a good description of status and degree of deterioration of the decubitus. The decubitus is not healing. Patient receives over 24 hour daily hypodermocylsis solution. Federal surveyor observed the aide perform the treatment for this A.M.

Decubitus care applying topical medications, and the Foley catheter irrigation, consists of Neosporin Solution. Aide indicated no licensed staff demonstrated treatment, that she observed another aide.

Poor technique observed, especially with respect to prevention of cross contamination. Aide used thin plastic glove, cleaning feces continuously, changed to do care to decubitus; however, aide proceeded to irrigate foley with same gloves after decubitus care. (See attached.) Technique not in accordance with facility's policy/procedure.

Federal surveyor suggested she wash hands, aide complied with request, poor technique in reference to Foley irrigation as it relates to promoting asepsis. Tube draped over thigh, thus not effecting good gravity for return of irrigating solution. Using medicated solution to irrigate Foley, Neosporin.

No assessment by RD since admission Hypo dermocylsis: 2.5% in ½ PSS with 150u Wydase. On a soft to bland as tolerated.

* Cardex diagnosis bladder infection listed—Federal surveyor cannot discern this in physician's notation.

Nothing in Care Plan in reference to problems and approaches to decubitus care. Statement on Nurse's notes indicate only decubitus care as ordered.

Additional notes:

7/11/76—Nurse's notes:

9:15 P.M. Patient perspiring freely, pain where hypodermocylsis inserted, vital signs; T-102 (R), P-100, R-36, B/P 118/60

10:00 P.M., T-103 (R) 10:55 P.M. physician returned call.

Tylenol gr x q.i.d. ordered.

7/12/76—Visited by physician in A.M.

7/17/76—Physician's note:

"Sacral decubitus is quite large and odorous.

Irrigate decubitus with clorox solution, diluted 1 pint to 9 pints water tid. Keflin 1.5 gm q 6° IM restore hypodermoclysis to thigh, add wydase amp. to each IV."

Nurse's notes do not reflect description of urinary irrigations. Federal surveyor cannot discern any C & S on a urine specimen.

See attached in reference to Foley irrigation procedure.

10. No. 1183—Mediciad

Admission 9/12/75

Diagnosis: Benign Prostatic with Hypertrophy
Bladder Calculus

C. C. Incontinence

Has Foley catheter

Teeth on P & E very poor condition, mostly gone, few remaining—bad condition.

* No additional dental follow-up

During week 7/19-7/23/76, patient having problem with catheter.

Physician in and changed catheter, and placed patient on I/O during afternoon of 7/22/76. Charge nurse for day initiated order; however, it was not implemented.

Federal surveyor brought order to attention of charge nurse on 7/23/76 at 10:30 A.M. She immediately checked the situation and implemented order written by physician, approximately 18 hours after.

* There is nothing on Patient Care Plan in reference to urinary problems.

* There is a physician's order for Valium 10 mg *IM* prn, 1 hour prior to obtaining blood for lab work. Transcription omits route of administration, i.e., IM

11. 1181—Medicaid

Diagnosis: Diabetes Mellitus, anemia,

Paranoid Schizophrenia

Admission 9/12/75

Physicial examination not done 48 hours of admission or within 5 days previous to admission. P & E performed 11/15/75.

* Omission in transcribing a medication order:
Thorazine concentrate 30 mg. PO bid

* Sparine 50 mg. if refuses Thorazine
Sparine 50 mg. IM q 12o prn

12. No. 1272—Medicaid

Admission 11/19/75

Diagnosis: Obstructive Emphyzema, ASHD

? diabetes, pyelitis

Federal surveyor observed a very thin W/M lying in bed. Very weak during tour of survey.
Several accidents have occurred:

7/5/76—3:30 P.M.

"Fell while going to bathroom with gnash on top of head.

Condition of patient lethargic. Medical Director called.

Patient sent to Presbyterian Hospital and returned at 10:30 P.M. that evening."

7/20/76—During 11-7 shift:

12 P.M. "Patient was apparently getting out of bed, had accidentally lost his balance and fell down with his face down to the floor. Was semi-conscious at that time. OJ given. Rescue squad came and administered IV 50cc of Dextrose. Patient responded at once." (No report of vital signs)

7/21/76—7:30 A.M.

VS; T-98.6, P-76, R-24, B/P 140/70

Alert and cooperative

No signs of difficulty this A.M.

Skin warm and dry, color good

Denies pain or discomfort, confused.

Two inch laceration scalp—closed

Bruise—forehead

Took a small glass of orange juice

Dr. Hand notified

10:30 A.M.—Physician's note:

Abrasion of head, forehead, nose

Quiet respiration, comfortable,

Bed side sugar low

Note last FBS dd 3/18/76 (88)

11:30 P.M.—Same day, nurse's note:

Charge nurse suspects hypoglycemic reaction. Dr. Hand notified. RD has not been in to assess patient.

13. No. 1327—Medicaid

Admission 2/19/76

Diagnosis—CVA, Aphasia

Per physician's note 2/19/76 "patient quite debilitated, will start on physical therapy. Decubitus RT hip, left hip and left buttock. Not ascertained if decubitus were present on admission.

Physician was informed by nursing that decubitus not healing. C & S ordered. RT hip. No report as yet.

Ordered 7/20/76.

Physician's note of 7/19/76:

"Called to see patient because of non-healing of decubitus, physical shows decubitus not as clean as it should be, cultures taken, and *nursing instructed about the cleaning of decubitus.

From 7/11/76-7/19/76, there is no accurate nursing description of status of this decubitus. Aide applying treatment—ointment. Right hip decubitus—diameter of a "25 cent piece" Left hip—approximately 1 inch in diameter—skin breakdown. Aide assigned to decubitus care.

Patient on I/O—chart—Doctor's order 1500 to 2000 cc/d omitted on 7-3 shift.

Care Plan needs update—contains notation has a foley—patient does not have a foley catheter. Patient receives PT.

Nurse's notes omit any notation re ROM exercises.

Foley during initial time of admission—April, May, 1976—

Federal surveyor could discern no order.

14. Chart No. 1322—Medicaid

* Federal surveyor spoke with patient on 7/20/76. He shared fact he fell out of bed, sustained a large black and blue bruise on back, approximately 3 inches in diameter, size of large grapefruit. Federal surveyor brought this to the attention of 3-11 charge nurse. She observed it immediately, indicated patient fell on 7/19/76, but he did not tell anyone.

Federal surveyor feels this should be detected during routine back care of this patient.

Physician to the patient 7/23/76. Physician had been in to see patient on 7/21/76 and patient did not inform him.

* Physician ordered Elixir Terpin Hydrate drams 1 q 3 hours with codeine 7/21/76. Not transcribed by charge nurse on day tour.

Federal surveyor shared this with charge nurse on evening.

Order noted immediately.

15. No. 1388—Medicare

Admission 5/28/76

Diagnosis: Parkinson's Disease involving left extremity

Review of physical therapy notes reveals services rendered: 6/22/76, 6/24/76, 6/25/76, 7/1/76, 7/6/76, 7/6/76, 7/7/76, 7/12/76, 7/15/76, 7/20/76, 7/21/76.

Patient evaluation conducted 6/3/76.

No discrete progress notes recorded from 6/22-7/21/76. Only date and RPT signature. Nurse's notes do not reflect any ROM exercises in conjunction with physical therapy.

16. No. 983—Medicaid

Current physician orders indicate PT and ST, no ST is given.

Diagnosis: CVA, Anemia

A recap of orders done by licensed nursing staff and physician signed "July recap."

RPT notes 5/20/76, 7/9/76, 7//13/76, 7/20/76 contain date and signature, no status report.

17. Chart No. 11—Medicaid

Admission 9/7/72

4/1/76 current P & E & Hx

Diagnosis: ASHD, renal insufficiency

Dental

Physician has indicated lower loose tooth, poor teeth condition, no dental follow-up. Patient has decubitus—developed while in nursing home.

5/20/76—Physician's note:

Called by nurse about decubitus getting worse, debrided and dressed.

7/1/76—Progress note by physician:

Decubitus healing.

* Decubitus ¼ inch deep—buttock area. Patient on B/B training. No nurses note re status. Decubitus care rendered by aide.

18. No. 1343—Medicare

Admission 2/29/76

Referred from Graduate Hospital

Adm P & E & Hx dated 3/1/76

* Physician Services

Federal regulations require this to be done within 48 hours of admission or within 5 days of admission from referring source.

2/19/76—Nurse's note admission:

"Patient admitted via stretcher from Graduate Hospital at 3:00 P.M. Foley draining well. Vital signs taken and noted.

No transfer information

CC Poor appetite

Neoplasm of head of Pancreas, MS

No decubitus on admission

Decubitus noted 5/25/76—size of dime—reddened area. Appears to be healing. There is no reference to Hepatitis—No evidence special precaution. This may be chronic due to diagnosis of CA of Pancreas?

On high protein and cheese

Patient has not been eating well—only RD note found—7/23/76

New dietitian has been hired. She visited patient this date.

19. Chart No. 122—Medicaid

Admission 6/2/70

5/1/75—current Hx and P & E due for 76 annual P & E

Diagnosis—post fracture—shoulder of hip

* 7/21/76

. . . "fell on floor, 9:45 P.M. Patient found lying on floor on back. Physician not in to see patient. Licensed nurse gave Valium 2 mg.

There is an order for this—Federal surveyor cannot discern physician's input after fall.

On 7/23/76

Approximately 8 diabetic patient's had hold trays. Many on insulin, which was also held.

Several patients complaining.

Lab work completed approximately 10:10 A.M.

Lab Technician started approximately 9:40 A.M.

All trays were cold—scrambled eggs, toast, coffee—one patient indicated that she never received tray—this was some time past 10:10 A.M.

* Federal surveyor observed no proportionate difference between 1500 and 1800 diabetic diets for breakfast meal. Same amount of juice, milk, bread.

Nursing

No. 998 Medicaid—On 7/1/76, physician ordered force fluids.

No evidence of fluids being forced except for a notation 7/4/76 by the night nurse which stated fluid forced. There was no indication of the amount.

* This patient was also sent to HMCH by mistake, the note from HMCH, dated 7/8/76, so indicated.

No. 1360 3/31/76 Medicaid—CVA right side Hemiplegia. This patient was observed with mittens on both hands, had poor posture, restrained, and in need of mouth care.

No. 1160 Medicaid 7/75—CVA—Hemiplegia.

On the day patient observed, generally not neat and in need of shaving, skin dry, badly in need of mouth care.

No. 1405—7/8/76—ASHD Diabetic—1200 cal Req—Decubiti observed on adm. The nurses notes

did not adequately describe decubitus areas. Areas on both heels necrotic.

No. 1341 Medicaid—CVA right Hemiparesis

On 7/17/76, intake and output ordered and fluids to 1500 cc/day—no evidence of this order being carried out. The patient also had foul breath odor

No. 857—Medicaid—Osteoarthritis of hands.

This patient had an order to force fluids, there was no record of intake.

No. 1096—Medicaid—3/12/75—Abdominal Aortic Anuresym

ASCVD order to be weighed daily, not recorded.

No. 1019 Medicaid 10/2/74—CVA c right Hemiparesis Epilepsy.

Treatment shows Foley irrigated weekly. There was no order for this treatment. Elase to Decubitus, no recorded nursing observation of decubitus.

General observations:

Nursing Care Plan did not reflect accurately patient needs. Revisions were not made as needed.

More registered nurse supervision is needed for employees providing care to patients on the third floor.

Once restraints are applied, there is no evidence of monitoring restraints. There were no observations recorded [illegible] patients restrained except the notation that the patient was restrained.

Attachment in reference to No. 1394
Foley irrigation procedure
Foley irrigation
Contents
Plastic Drainage Tray
Plastic Graduate

Plastic Bulb Irrigating
Syrene 50 cc
Cotton Gauze 4" x 4"
Plastic Coated Towel
Graduate Cover
Syringe Tip Protector (omitted from procedure)

Procedure

1. Snap bag open and remove tray.

2. Position patient and place plastic bag on bed to be used as a waste receptable.

Patient not positioned correctly to effect drainage solution flow by gravity. Patient on left side, foley tubing draped over thigh.

3. Remove tray cover, either by sliding tray out of sleeve, or tearing sleeve at tear spot, depending on technique. Place plastic backed paper towel, absorbent side up, under patient.

4. Grasp outside graduate w/lid, containing syringe, remove and stand graduate upright to maintain sterility of inner surfaces. Remove syringe and place in tray to protect sterility. Prepare irrigating solution/MD's order—Solution already prepared—Neosporin Solution—Medication—

Irrigation by aide

5. Remove syringe protector and place on drainage tube connection to maintain tube sterility during procedure, before proceeding with procedure.

Not done, no tip protector, tubing end placed on sheet.

Aide proceeded to go from decubitus care to catheter irrigation. Federal surveyor suggested that she wash hands before proceeding with procedure.

6. Place syringe in solution and slowly depress bulb then release, to fill syringe. Proceed with irrigation, observe aseptic technique, collect irrigation, observe aseptic technique, etc.

Record findings in nurse's notes. Aide did procedure, only initialed a special Rx sheet.

Standards, elements not met under nursing

Standard (b) Charge nurse. *Elements* 130 and 132 are not met.

The administrator, on occasion, has assigned the Director of Nursing as charge nurse.

Federal regulations require that the charge nurse is to be designated by the *director of nursing services* for each tour of duty. Moreover, the director of nursing cannot serve as a charge nurse in a facility with an average daily total occupancy of 60 or more patients.

Standard (c) *Twenty-four hour nursing service is not met.* Elements F 135, 136, 137 have deficiencies. (See the narrative report)

Standard (d) Patient Care Plan is not met.

Thirty-two (plus) care plans were reviewed. Fifteen of the care plans lacked some items that are required by Federal regulations. The majority did not indicate the coordination of other services, i.e., dietary, physical therapy. The majority of care plans contained only the nursing aspect of care. In a few instances, care plans were not completely in accordance with physician orders. The revisions did not indicate changes in patient status. Omissions were observed in the care plans of following chart numbers: No. 1402, 1064, 402, 1135, 952, 1394, 1183, 1272, 1327, 1388, 122, 1398, 1158, 1414, 1406. (Care plans of patients on the fifth floor at Town Court.) In addition, the

general observation with respect to care plans on the fourth floor reveals nursing care plans did not reflect accurately patient needs. Revisions were not made as needed.

Standard (e) Rehabilitative nursing care is not met.

Deficiencies are noted in the following areas: Documentation is inadequate with respect to ROM exercises performed by nursing as an extension of physical therapy. In some instances, there is no documentation with respect to patient progress in progressing in activities of daily living. There are references to bowel and bladder training.

Standard (f) Supervision of patient nutrition is not met.

In reference to the diabetics and in other special instances, nursing does not record adequate type of foods consumed and notification to dietary with respect to problems. The RD started documenting on patients' records on 7/20/76. Previous to this, the Federal team could not observe dietary input. A new dietitian was hired 7/23/76, thus some of the dietary concerns may be resolved. On one record, the physician ordered an Intake and Output; however, the charge nurse had not transcribed the order until reported by the Federal surveyor the next day. This was uncovered by review of the patient's chart. (Cross reference with dietary services deficiency list.)

Element (F 190) under Standard (h) Conformance with physicians' drug orders. In certain instances, medication orders were not transcribed correctly or promptly. (See the nursing narrative.)

Element (F 206) under Standard (i) Storage of drugs and biologicals.

The emergency drug box is not kept readily available. It is located in a locked closet on the second floor exit stairwell. The supervisor on duty is to be called if the emergency box is needed. The June 29, 1976 pharmacy report indicates separate emergency drug boxes are to be housed and accessible on each unit. As of July 23, 1976, this had not been done. The Director of Nursing informed the surveyor that this would be completed during the week of July 26th. The deficiency is cited to insure appropriate follow-up.

24

Census 194

Staffing, Nursing Hours Per Patient Per Twenty-four Hours

Work Week Begins Thurs.
Ends Wed.

Date	Nursing Hours/Patient Per 24 hours		No. of Nursing Personnel	No. of Hours Per Day	DON	Asst. DON
July 1, 1976	(Thurs)	2.14	52	416	not included	included
July 2, 1976	(Fri)	2.18	53	424	not included	off
July 3, 1976	(Sat)	2.14	52	416	not included	off
July 4, 1976	(Sun)	2.18	53	424	off	included
July 5, 1976	(Mon)	2.22	54	432	off	serves as DO not included
July 6, 1976	(Tues)	2.18	53	424	not included	included
July 7, 1976	(Wed)	2.35	57	456	not included	included
July 8, 1976	(Thurs)	2.26	55	440	not included	not included
July 9, 1976	(Fri)	2.30	56	448	not included	not included
July 10, 1976	(Sat)	2.18	53	424	off	off
July 11, 1976	(Sun)	2.22	54	432	not included	off
July 12, 1976	(Mon)	2.35	57	456	not included	not included
July 13, 1976	(Tues)	2.14	52	416	off	F132 deficien included charge on C-2
July 14, 1976	(Wed)	2.39	58	464	off	" "
July 15, 1976	Thurs)	2.35	57	456	not included	included
July 16, 1976	(Fri)	2.38	59	472	not included	not included
July 17, 1976	(Sat)	2.47	60	480	off	off
July 18, 1976	(Sun)	2.38	59	472	off	off
July 19, 1976	(Mon)	2.58	64	502	included DON charge on 2 F132 deficiency	states she is DON today?
July 20, 1976	(Tues)	2.88	65	560	not included	not included
July 21, 1976	(Wed)	2.88	65	560	not included	not included

Recommendation—Nursing Services

1. Licensed nursing staff be assigned to the special treatments, i.e., decubitus care that require topical medications, foley catheter irrigations, other special treatments.

2. Licensed nursing staff need to improve in describing the status, i.e., healing or deterioration of a decubitus ulcer and not just a recording that a treatment is done. On the majority of instances, on the day tour, the aides performed these special treatments.

3. Licensed nursing staff need to closely supervise aides to ensure proper care. This can be accomplished via direct supervision and increasing rounds on certain patients.

4. The facility should conduct a study in reference to care of decubitus and prevention of decubitus.

The following is noted:

The administrator is attempting to address the problems in nursing. This is demonstrated in his hiring of a new director of nursing and assistant director of nursing, February, 1976. The facility is attempting to recruit more licensed staff. The director of nursing indicates there are eight (8) licensed staff vacancies: 2 RN's and 6 LGPN's. The administrator has initialed the following:

Daily schedule of rounds:

Administrator/Director of Nursing—3rd floor
11 A.M. Mon.

Administrator/Director of Nursing—2nd floor
1 P.M. Tues.

Administrator/Assistant Director of Nursing—5th floor—2 P.M. Wed.

Administrator/Assistant Director of Nursing—4th floor—10 A.M. Thurs.

The facility has combined the recording of physician and nursing progress notes.

On March 19, 1976, a notation was made by the Administrator, "to date, there has been a poor amount of follow-through in providing quality nursing care. To be remedied today. Each of you (referring to the Director of Nursing and Assistant Director of Nursing) are expected to check each chart each week on your respective floors to ensure accuracy, completeness and that physician's orders are carried out." Four months have passed and in the review of the 27 records, the problem of a "poor amount of follow-through" continues. Particularly in those areas outlined in the proceeding paragraphs.

In addition, the Federal surveyor learned through an interview with the Director of Nursing that both, she and the Assistant Director of Nursing, report to the administrator. This may create a problem in central decision making in nursing. The facility should review this and clearly appoint a Nursing Director who has central authority.

This interview reveals that the administrator, on occasion, has assigned the Director of Nursing to be charge nurse on Floor C-2. Under the requirement for charge nurse, F130 states in part: ". . . a registered nurse, or a qualified licensed practical nurse (vocational) nurse, *is designated as charge nurse by the* Director of Nursing Services for each tour of duty. The Assistant Director of Nursing would be more appropriate to designate if the additional nurse were

needed. In addition, Federal regulations require that the Director of Nursing does not serve as a charge nurse in a facility with an average daily total occupancy of 60 or more patients.

One of the surveyors provided some possible insight regarding this. The Administrator is evaluating the current Director of Nursing as it pertains to her performance as the Director of Nursing. This can be accomplished without jeopardizing her current responsibilities, i.e., not assigning charge nurse responsibilities. Note, the Director of Nursing was assigned charge nurse on C-2, the initial day of the survey.

The facility had the Registered Dietitian review patients in reference to dietary. On 7/20/76, notations were made. Federal surveyor could not discern any previous notes on the current records. On 7/23/76, a newly hired dietitian was observed making rounds.

The Administrator asked Federal surveyor for reference concerning nursing audits.

Dietary Services 405.1125

Standard (a) Staffing is not met.

Deficiences are noted in F210, F211 and F213. The survey reveals that although the facility has contracts with two ADA's the frequency of visits is not enough for this facility. Moreover, considering the size of the facility and the type of diets required, increased dietary personnel is necessary.

Please note that Federal surveyors observed the dietitian documenting in patient records on July 20, 1976. Previous to this date, for the majority of patients on special diets who would need some follow-up, there was no documentation or visitation by the con-

sultant dietitian. The dietitian has been ill and the facility hired a new dietitian on July 23, 1976. The dietary consultative activities need monitoring to ensure that the dietary needs of patients are met.

Please see the nursing narrative with respect to the current omissions of dietary. For example, a particular situation occurred to an individaul patient: Chart 1313 Medicaid, admission 2/3/76. Diabetic—Hemiplegia, Left CVA. The physician ordered on June 17, 1976, "please have dietitian review patient." Progress notes also indicate that a dietary request has been made as of June 18, 1976.

A nursing progress note to the physician indicates the administrator stated that "when he gets a dietitian, the resident may have a conference with him." On June 30, 1976, the patient continued to complain of being hungry all the time. The patient has gained twenty pounds. On July 4, 1976, nursing progress record showed that the patient is still complaining of being hungry. Nursing service requested the dietitian to speak with this patient, but as yet this had not been accomplished. The notation indicates I am sorry that the patient is hungry. On 7/13/76, patient is complaining. On 7/23/76, this patient was seen by the newly hired dietitian.

Standard (b) Menus and nutritional adequacy is not met.

The survey reveals that although menus are planned they are not implemented.

Standard (c) Therapeutic diets is not met.

Deficiencies are noted in elements F224 and F225, the survey reveals that the diets indicated in dietary and those on the floor do not agree.

2nd floor	
Regular	17
Diabetic	2
Low Na.	4
	24
3rd floor	
Regular	31
Soft	4
Puree	1
Diabetic	12
Low Na.	10
	58
4th floor	
Regular	37
Soft	3
M/S	2
Puree	3
Diabetic	9
Low Na.	4
	58
5th floor	
Regular	25
Puree	2
Diabetic	16
Low Na.	9
	52

The fifth floor staff nurses indicated nine diabetic diets. A better system of transfer of information about diets must be established.

Standard (e) Preparation and service of food is not met.

Deficiencies are noted in elements F238 and F239. The survey reveals due to the lack of well trained staff, food is prepared without consideration for attractive looking meals, nor are substitutions made appropriately. Work assignments are not implemented in this department.

Element under *hygiene and staff* (f) is not met, F242. Food handling techniques observed are poor.

Element under *sanitary conditions* (g) is not met, F247. The area for storage of waste was dirty and not acceptable. Individual diet cards are dirty. Refrigeration in the storage area is dirty. The dietary condition of participation is marginally met.

Specialized Rehabilitative Services

Element F258 under Standard (b), plan of care is not met. The survey reveals that treatments are recorded regularly; however, patient progress is not recorded.

Pharmaceutical Services

Element 268 of Standard (a) Supervision of services is not met. The pharmacist indicates to the administrator that he reviews each patients' drug regimen. However, the notation made on each cardex is not an acceptable signature. Some type of symbol is made and it is not discernible. Moreover, many of the medication and charge nurses did not recognize the symbol.

Through OLTC, formerly ONHA (policy directive), the monthly review of the patient's drug regimen is to be noted by the Registered Pharmacists on the patient's individual medical record. This can easily

be accomplished by noting in the margin of the physician's drug orders and a clear signature with the title R Ph. Medical records standards require that a signature and title be given for licensed health practitioners and also when non-licensed staff record observations, etc., i.e., Mrs. Ann Jones, nursing assistant.

Element F281 under (d) Pharmaceutical services committee is not met.

The survey reveals that the medical director does not meet with the pharmaceutical committee at least quarterly.

30

Not Met	Findings	Recommendations
Lab & X-ray 405.1128 (a) Provision for Services Factor not met	In one record of 23 reviewed, 12 lab tests were done and charged to Medicare. There were no doctor's orders for these tests. In another record of 23 reviewed, 8 lab tests were done with no doctor's orders and, likewise, billed to Medicare.	Policies and procedures stating that services are provided only on the orders of the attending physician were available, but should be enforced. The OLTCSE should notify the intermediary of these two cases (Case Numbers 1306 and 1267
Dental 405.1129 (a) Advisory Dentist Standard not met	Last in-service (Mouth Care) was conducted 6/4/75. No indication from staff or written documentation that advisory dentist recommends oral hygiene policies and practices for the care of patients	In accordance with the dental agreement and polici the administrator and medic director should assure that the dentist provides in-service and recommends oral hygiene policies and practises as appropriately needed.
(b) Arrangements for outside services-Factor not met	Name and phone numbers of dentists was not documented in patients' medical records nor were lists and phone numbers of dentists available at nurses' stations. The facilit does have an agreement with Graduate for dental services and this number is available at nurses' stations.	Self-explanatory
Social Services 405.1130 All standards met (b) Staffing	Agreement with qualified social worker signed 7/23/76 by administrator and social worker. According to the administrator, the social worker will begin duty 7/24/76.	As with all health deficiencies found on this validation survey, OLTCSE should monitor carefully to assure that the qualified social worker provides required services.

Physical Environment 405.1134

Elements F384, F385, F388, F389 under Standard (c) facilities for the physically handicapped are not met.

The survey reveals that there are insufficient water fountains and public telephones of average heights. There is no provision for the blind to identify rooms, facilities and hazardous areas. The facility does not provide audible and visual warning signals.

The surveyor needs to determine if the latter requirement is waiverable. All deficiencies are to be corrected.

Infection Control 405.1135

Element F446 under Standard (d) linen is not met. The survey reveals that ventilation in the soiled linen room is not adequate.

Standard (e) Pest Control is not met.

Roaches were seen on the fourth floor and third floor. The exterminating program in effect needs to be intensified.

Disaster preparedness 405.1136

Standard (b) Staff training and drills is not met.

A review of the fire drills showed evaluations by the staff for the past three months except for 1975. No drills were held January, February. The employees rated the drills from fair to poor; therefore, additional improvements in the training programs are needed.

Not Met	Findings	Recommendations
Medical Records 405.1132 (c) Content Standard not met	In 16 discharge records reviewed, discharge summaries were not completed and signed by the attending physician. In 4 of 13 current records reviewed, orders were not reviewed and updated every 30 days by the attending physician. Dental notes were not documented in medical records for the only three patients that were referred for dental treatment. Dietary notes were not documented in 27 of 29 records reviewed. Discharge summaries from referring hospitals were not available in 6 of 29 records reviewed.	The facility has appropriat policies and procedures regarding the deficiencies found. The administrator, medical director, and medical record consultant should collaborate in enforcing these policies and procedures. The medica record consultant should visit more frequently to assist in correcting these deficiencies.
(e) Completion of records and centralization of reports. Standard not met	See standard (c) Discharge summaries not completed and signed by the attending physician and not received from referring facilities.	See standard (c)

33

Not Met	Findings	Recommendations
U. R. 405.1137 (h) Discharge planning Standard not met	The administrator has not delegated responsibility for discharge planning in writing. Written discharge planning procedures do not state how the discharge coordinator will function, and his authority and relationships with the facility's staff. The maximum time period after which a re-evaluation of each patient's plan is made indicates only that patients' plans will be re-evaluated as often as necessary. Discharge summaries are not complete with attending physician's signature. Documentation in medical records indicated that discharge planning is initiated on admission only.	Administrator, medical director and social worker consultant should collaborate in correcting deficiencies. State survey agency should provide special consultation and technical assistance for this deficient standard.

Other standards and elements found not met.

Element F43 under 405.1121 Standard (g) personnel policies and procedures. The survey reveals not all personnel records are current. Evaluations and training orientation was missing.

Standard (h) Staff development is not met.

Deficiencies are noted in elements F49, F50, F51, F52

Although documentation is available, there is no active orientation or ongoing training in the facility being given consistently nor does the program provide for inservice in:

Patient confidentiality
Preservation of patient dignity
Protection of patient's privacy

The documentation available is not specific nor does it reflect a consistent program for all personnel.

Elements F55 and F75 under Standard (i) Use of outside resources are not met.

The agreements must reflect objectives and financial arrangements as well as responsibilities. Although agreements are available, they did not confirm the active participation of the consultants in the facility. Consultant reports are not consistent nor do they reflect recommendations for the facility to implement. i.e., No consultant reports for social services. The last medical records' consultant report is dated 3/4/75.

Consultant reimbursements are not benefiting the patients in this facility particularly in the area of dietary and social services. The facility needs to correct this situation immediately so that individual needs of patients will be met.

Elements F65, F66, F67, F71 are not met under Standard (k) Patient Rights.

It appears that patients within the homes owned by the chain are transferred because of finances. F70. This allegation needs further exploration by the state agency.

Element F85 under Standard (l) Patient Care Policies.

The survey reveals that the medical records and minutes do not reflect that policies and procedures are written as implemented.

It should be noted that the facility has policies; however, the involvement of the medical director is questionable.

Standard (h) Standard kitchen and dietetic service areas not met.

See notations under dietary services standards 405-.1125 (e), (f) F242 and (g) F247.

Please note in reference to housekeeping and maintenance, the carpets throughout patient areas need cleaning. Urine odor is retained in the carpets.

ATTACHMENT 5

MEDICARE/MEDICAID

CERTIFICATION AND TRANSMITTAL

TO BE COMPLETED BY STATE SURVEY AGENCY

1. MEDICARE PROVIDER NUMBER (L1) 39-5337

2. MEDICAID ID NUMBER (L2) #0400357

3. NAME AND ADDRESS OF FACILITY
(L3) Town Court Nursing Center
(L4) 1526 Lombard Street
(L5) Philadelphia, Penna. (L6) 19146

4. TO: DHEW REGIONAL OFFICE
Reg. III
Philadelphia, Penna.

TO: TITLE XIX SINGLE STATE AGENCY
Dept. of Health
Commonwealth of Pennsylvania

5. CATEGORY OF PROVIDER / SUPPLIER (L7)
01 ☐ Gen. Hosp. 05 ☐ HHA 09 ☐ Chronic Dialysis Unit
02 ☐ Psych. Hosp. 06 ☐ Independent Lab. 10 ☐ ICF
03 ☐ TB Hosp. 07 ☐ Portable X-Ray 11 ☐ IMR
04 ☒ SNF 08 ☐ Outpatient PT/SP

6. TYPE OF ACTION (L8) X Special health survey-HEW request
1 ☐ Initial 4 ☐ Change of Ownership
2 ☐ Recertification 5 ☐ JCAH/AOA Validation
3 ☐ Reconsideration 6 ☐ JCAH/AOA Investigation

7. DATE OF APPLICATION (Initial certifications ONLY) (L9)

8. ACCREDITATION VERIFIED (Hospitals) (L10) 1 ☐ JCAH 2 ☐ AOA

CHANGE IN ACCREDITATION-BASED CERTIFICATION (Hospitals) (L11)
1 ☐ Gained Accreditation 2 ☐ Lost JCAH Accreditation
3 ☐ Lost AOA Accreditation

10. PURSUANT TO PROVISIONS OF SEC. 1864 AND APPLICABLE PROVISIONS OF TITLE XIX OF THE SOCIAL SECURITY ACT AND UPON CONSIDERATION OF ALL FACTS THE FACILITY IS CERTIFIED AS: (L12)
(a) ☐ In compliance with program requirements (If appropriate, check applicable boxes below)
(b) ☐ Not in compliance with program requirements (If Title XIX only, complete item 15)

Compliance is based on:
(1) ☐ Acceptable P.O.C.
(2) ☐ CFR sec. 405.1010 (Access provisions)
(3) ☐ P.L. 91-690 (24 Hour RN)
(4) ☐ 1861(j)(15)(7 day RN rural SNF)
and/or approved waiver(s) of the following requirements:
(5) ☐ Life Safety Code
(6) ☐ ANSI (Std. A 117.1)
(7) ☐ Organized Medical Staff
(8) ☐ Patient Room Size
(9) ☐ Beds Per Room

(c) ☐ Reapproval Deferred Until: (See Remarks)
(d) ☐ SNF/ICF Cancellation Date is: (1) ☐ Invoked (2) ☐ Rescinded

LICENSING, SCHEDULING & TRACKING UNIT
MAR 23 1977
DIVISION OF LONG TERM CARE
DEPT. OF HEALTH

11. SNF / ICF PERIOD OF CERTIFICATION (L13) (a) FROM (b) TO:
(c) CANCELLATION DATE (SNF/ICF) (L14)

12. SUPPLEMENTAL INFORMATION ON HOSPITALS AND SNF'S NOT IN COMPLIANCE (L15)
(a) Hospital meets emergency services hospital definitions (1) ☐ Yes (2) ☐ No
(b) Facility meets 1861 (e) (1) - Definition of hospital (1) ☐ Yes (2) ☐ No
(c) Facility meets 1861 (j) (1) - Definition of SNF (1) ☐ Yes (2) ☐ No (3) ☐ See attached SSA 1539 (a)

13. SUPPLEMENTAL ICF INFORMATION (L16)
(a) Completion date for ICF/LSC compliance
(b) 249.13 ICF Phase in Date

14. TOTAL OR DISTINCT PART CERTIFICATION	HOSPITALS	XVIII SNF	XVIII/XIX SNF	XIX SNF	XIX ICF	XIX IMR
BEDS CERTIFIED (L17)	(a)	(b)	(c) 198	(d)	(e)	(f)
BEDS PREVIOUSLY CERTIFIED (L18)	(g)	(h)	(i) 198	(j)	(k)	(l)

15. STATE SURVEY AGENCY REMARKS Report of Special Health Survey Attached.

Judith A. Passerin — 17. DATE (L19) 11 22 77
Judith A. Passerin
TITLE Registered Nurse

18. Joy B. Laff per J.A.P. — 19. DATE (L20) 4/8/77
TITLE Director, Division of Long Term Care

TO BE COMPLETED BY THE DHEW REGIONAL OFFICE OR SINGLE STATE AGENCY

20. DETERMINATION OF ELIGIBILITY (L21)
1 ☐ Facility is eligible to participate
2 ☐ Facility is not (or no longer) eligible to participate (If Title XIX only, complete item No. 26)

21. ☐ Facility is in compliance with Title VI of Civil Rights Act (L22)

22. ☐ Statement of financial solvency filed in accordance with regulation 405.603. (L23)

23. EFFECTIVE DATE OF (Enter All Applicable)
(a) PARTICIPATION (L24)
(b) AGREEMENT ENDING DATE (SNF) (L25)
(c) CANCELLATION DATE (SNF) (L26)
(d) SNF/ICF AGREEMENT EXTENDED, UNDER SEC. 1866(e)(1)(C) OF SOCIAL SECURITY ACT UNTIL: (MAXIMUM OF 60 DAYS) (L27)
(e) TERMINATION OR NON-RENEWING DATE (L28)
(f) EMERGENCY SERVICES (L29)

24. VOLUNTARY TERMINATION (L30) 1 ☐ CLOSURE 2 ☐ WITHDRAWAL 3 ☐ OTHER (Specify)

25. INTERMEDIARY NUMBER (L31)

26. REMARKS

27. PHS REVIEW (When applicable) 28. DATE (L32) 29. DETERMINATION APPROVED 30. DATE (L33)

Form SSA-1539 (11-70) OFFICE OF RESEARCH & STATISTICS

SOUTHEASTERN REGION
LONG TERM CARE

Telephone Number
Area Code (215) 631-
Ext. 2325

January 20, 1977

Norristown State Hospital
Building No. 37
Norristown, Pennsylvania 19401

Mr. Daniel Veloric
President, Geriatric Medical Centers
c/o of Town Court Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Dear Mr. Veloric:

An unannounced visit was made to Town Court Nursing Center on November 22, 23, and 24, 1976, by David Hawk, M.D., Kay Dodds, R.N., Carole Schneider, R.N., and Nancy Burns, R.D., and me. The state survey team was joined by Ms. Claudette Campbell, R.N., HEW Long Term Care, on November 22, 1976.

The purpose of the visit was a follow-up survey based on the findings of a federal violation survey conducted July, 1976.

Patient care and physical environment observed on the days of the survey and in patient care areas was unacceptable. Significant deficiencies of a serious nature were identified in these areas as well as dietary, medical records, pharmacy, and infection control services.

These deficiencies were discussed in part with you and in total with John Halbrook, NHA, and members of the corporate administrative staff.

A follow-up visit to Towncourt on December 30, 1976, indicated that some inprovements in patient care areas and dietary have been made since the November, 1976 survey.

Enclosed is form SSA 2567 which outline the deficiencies. Please enter your plan of correction (including target dates) opposite each deficiency and remit to this office within ten (10) working days from receipt of this letter. You may detach and retain the provider copy for your files.

If you have any questions regarding this letter or the visits please do not hesitate to contact this office.

Very truly yours,
(Mrs.) Judith A. Passerin, R.N.
Field Representative

JAP/cef
Enclosures

January 3, 1977

Town Court Nursing Home
Jay E. Laff
Director, Division of Long Term Care

Judith A. Passerin, R.N.
Field Representative

Through: Dorothy H. Poppert, R.N.
Regional Supervisor

Enclosed please find the Summary of the visit to Town Court conducted November 22, 23, 24, 1976.

The full health survey report is currently being completed and will be forwarded as soon as possible.
JAP:ct

Town Court Nursing Home
1516 Lombard Street
Philadelphia, Pa. 19104

Kathleen Dodds, R.N.
Carole Schneider, R.N.
Judith Passerin, R.N.
Nancy Burns, R.D.
Field Representatives

SUMMARY

An unannounced visit was made to the above mentioned facility on November 22, 23, 24, 1976, by Mrs. K. Dodds, R.N., Miss Carole Schneider, R.N., Mrs. Nancy Burns, R.D., David Hawk, M.D., and Mrs. Judith Passerin, R.N. The surveyors were accompanied by Ms. Claudette Campbell, R.N., on the first day of the visit.

In July, 1976, a Federal survey team conducted a validation survey at this facility. Deficiencies were identified in medical and nursing services. The purpose of this visit was a full health survey to evaluate health care delivery and services to patients resultant to the report forwarded to this office by H.E.W.

The facility's administrator, Mr. John Holbrook, NHA, was apprised of the nature of the visit and the findings of the validation teams survey at the outset. A tour of the facility followed.

The patient care areas were toured by all members of the team. Serious patient care and environmental deficiencies were identified.

Patients were observed to be in need of assistance with activities of daily living. Many patients were improperly attired; dirty and torn clothing, barefooted, incontinent patients were soiled. Male and female patients were in need of showers, nail, mouth and hair care.

Patients both in and out of bed were observed in poor body alignment. Evidence of restorative nursing measures were not seen. Adaptive equipment is not utilized.

One patient with massive decubitus ulcers was ordered to be placed in isolation on the first day of the surveyor's visit. The following morning, the isolation technique and procedures were reviewed. This patient had been placed in a private room that was fully carpeted, even though tiled, private rooms were available.

The isolation gowns were of a disposable nature and sleeveless. When the survey team questioned the decision to utilize a carpeted room for isolation purposes, the patient was moved to another room.

Nursing assistants were later observed caring for this patient. They were not wearing gowns nor gloves. The soiled laundry was being carried out of the patient's room by a nurse's aide. This aide did not bag the laundry and was carrying it clutched to her body.

On all patient floors visited, patients were seated in lounge areas in numbers from 11 to 16. No nursing personnel were in attendance in these lounge areas.

Patients were observed restrained in chairs; the restraints were attached to the patients beds.

The physical environment in patient areas was poor. Soiled and clean linens were observed piled together on patients beds, bedside cabinets and chairs. Water

pitchers and cubicle curtains were observed soiled with feces. Toilet brushes were observed stored with water carafes and drinking cups. Roaches were observed in the second and third floor pantry. A urine odor was prevalent on the second and third floors. Shower and tub rooms as well as the floors of patient bedrooms were in need of cleaning. Soiled underpads were observed in patients bedside cabinets, on the floor and in bedside trash containers.

The dietary department was clean. Although a well qualified dietician has been employed by the facility, to-date she has not been able to function in her consultant capacity. Menus prepared by the dietician were rejected so that a menu utilized by another corporate facility could be instituted.

Medical records were reviewed by all survey team members. (See attached report by David Hawk, M.D.)

Many of the records reviewed lack patient care plans. Nursing care plans did not reflect the actual patient needs or goals. Verbal orders were not countersigned on a timely basis. Physicians' orders were not being executed promptly or correctly on eight records reviewed. Nurses' notes were not chronological or consistent especially as relates to patients who become ill or manifest unusual signs or symptoms. Medications were not being administered properly nor charted correctly (e.g. tincture of benzoin was being applied to a decubitus ulcer, tetrocycline was administered to a patient receiving milk).

The findings of the survey were discussed in detail with the President, Mr. Daniel Veloric, and several of his corporate and administrative staff members.

Suggestions for improvement in the various areas discussed were made.

The staff of this facility appeared receptive and concerned.

Addendum:

On December 20, 1976, members of the Town Court N.H. Staff were present in this office for consultation at their request. Those present were Daniel Veloric, President, John Holbrook, N.H.A., Bernadine Sterner, R.N., D.O.N., and Charles Fagin, F.S.S.

Mr. Holbrook introduced Mrs. Sterner, as the newly appointed director of nursing. The various changes in the operation of the facility and policy changes were reiterated.

A request was made, at this time, that a follow-up survey to the facility be made.

On December 30, 1976, an unannounced follow-up visit was made to Town Court by Mrs. Nancy Burns, R.D., and Mrs. Judith A. Passerin, R.N.

Patient care areas and the dietary department were toured. Overall improvements have been made. Nursing supervision has been increased. Assignments for nursing personnel are more concise and fit patient needs.

Housekeeping in-patient areas continues to be a problem. The handling of clean and soiled laundry although improved is still a problem.

Patient care observed has also improved but specific attention must still be directed to patients personal hygiene needs (torn clothing, ill-fitting clothing, socks, sweaters, nail care, shaving).

Many patient beds lacked blankets and patients complained of being cold.

Vast improvement has been noted in the dietary department. The menus have been totally revised to provide a nutritionally adequate diet with a nice variety of foods. Both the consultant dietician and the food service supervisor are aware of the individual dietary needs of the patients and are diligently striving towards a superior food service program. Dietary staff is still inadequate to sufficiently cover all functions of the department. Suggestions were made by the surveyors in regard to more frequent monitoring of night nourishments by nursing personnel (3-11 shift) to insure that patients routinely receive a bedtime feeding. The status of the food service supervisor is still undetermined pending receipt of documentation indicating he has completed an approved 90 hour course.

A post-visit conference was conducted with John Holbrook, NHA, Mrs. Cassidy, R.N., and Edward Zelcawitz, NHA. The improvements and findings were discussed. Mr. Holbrook has resigned his position and it is hoped that a replacement will be available as soon as possible to affect continuity. The corporate management team reportedly is spending considerable time and effort on-site in the facility so that compliance can be met.

ct

Visited 11/22, 23, 24, 1977

Town Court Nursing Center
1526 Lombard Street
Philadelphia, Penna. 19146

RECOMMENDATION:

Follow-up visits and/or consultation services to facility to insure continued improvements in patient

care and health services, as indicated in the plan of correction.

Attention should be directed to insuring that the facility exercises appropriate measures to attain compliance with all of the conditions of participation prior to expiration of the current provider agreement (as outlined by Robert Taylor at meeting in the OLTCSE January 5, 1977).

JAP:glm

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc., et al.

v.

Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, et al.

IX.

ORDER

AND NOW, this 15th day of September, 1977, upon consideration of plaintiffs' Motion for extending the duration of the preliminary injunction heretofore entered in this case, and after hearing thereon, it is ORDERED.

That plaintiffs' Motion is DENIED, and the preliminary injunction heretofore entered is DISSOLVED: provided, however, that the defendants shall not withhold payments for services actually provided to patients.

John R. Fullam,
J.

Filed September 15, 1977
9/16/77 Copy to USA
Entered: 9/16/77 Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc., et al.

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Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, et al.

X.

ORDER

AND NOW, this 15th day of September, 1977, plaintiffs having made oral application for a stay of this Court's Order, entered this date, substantially dissolving the preliminary injunction heretofore entered in this case, and the Court being of the view that the injunction should remain in effect for a sufficient period of time to permit the plaintiffs to appeal this Court's said Order, and to seek a further stay from the Court of Appeals, it is ORDERED that this Court's Order bearing even date herewith, dissolving the preliminary injunction heretofore entered in this case, is STAYED for a period of Ten (10) days from the date hereof, to permit the plaintiffs to file a Notice of Appeal and seek a further

stay from the Court of Appeals. To the extent that plaintiffs seek a longer stay from this Court, the request is DENIED.

(s) John P. Fullam
J.

9/16/77

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474
Class Action

Town Court Nursing Center, Inc.
and
Emma Cooper
and
Mary Crawford
and
Hazel Kemp
and
Arnold L. Phillips
and
Delphine Taddei
and
Nancy Truitt, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Plaintiffs

v.

Frank S. Beal, individually and in his capacity, as Secretary of Public Welfare of the Commonwealth of Pennsylvania
and

Joseph A. Califano, individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants

XI.

NOTICE OF APPEAL

Notice is hereby given that Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc., plaintiffs above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order entered in this action on September 15, 1977.

(s) William F. Coyle
William F. Coyle
1430 Land Title Building
Philadelphia, PA 19110
Attorney for Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt

DATED: September 16, 1977

Filed Sep. 16, 1977
Entered 9/20
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc.
and
Emma Cooper
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Plaintiffs

v.

Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

Joseph A. Califano, individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants

XII.

NOTICE OF APPEAL

Notice is hereby given that Town Court Nursing Center, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order entered in this action on the 15th day of September, 1977.

(s) Jeffrey Albert
Jeffrey B. Albert
1401 Walnut Street
10th Floor
Philadelphia, PA 19102
Attorney for Town Court Nursing Center, Inc.

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Dated: September 16, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

XIII.

MOTION

[Caption Omitted]

Appellants, Town Court Nursing Center, Inc., by its attorneys, Nathan L. Posner and Jeffrey B. Albert, Esquires, and Emma Cooper, et al., by their attorney, William F. Coyle, Esquire, hereby move this Honorable Court to issue, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, an injunction pending appeal in the above-captioned action and in support thereof set forth the following:

I. HISTORY OF THE CASE

1. On July 20, 1977, the above-captioned action was filed by Town Court Nursing Center, Inc. ("Town Court") and six patients (collectively referred to as "plaintiffs") seeking under the Fifth and Fourteenth Amendments to the United States Constitution and applicable federal regulations injunctive relief against, *inter alia*, the termination of Town Court's participation in the Medicare and Medicaid programs and the removal of patients from the skilled nursing home operated by Town Court until the administrative and judicial review of the termination is completed.

2. On July 22, 1977, at a conference attended by all counsel, the Honorable John P. Fullam, United States District Judge, issued a temporary restraining order maintaining the status quo until a hearing could be held.

3. A preliminary hearing was held on July 26 and 27, 1977. A true and correct copy of the transcript of that hearing has been separately filed. The District Court, per Judge Fullam, granted plaintiffs certain preliminary injunctive relief in the bench order and opinion, quoted below:

> The Court: I will note further that I have at counsel's request met with them in chambers and they in turn have met with each other, and it is my understanding that the Order which is about to be entered, while not consented to by any of the defendants, probably is not terribly inconsistent with their views as to an appropriate disposition.
>
> Specifically on the basis of the evidence which has been presented, it is my feeling that the harm which would be done to the patients as well as to the corporate plaintiff by the cessation of funding would be devastating and irreparable whereas there can be serious question as to the jurisdiction of this Court with respect to the merits of the controversy. I believe this Court does have jurisdiction for the limited purpose of maintaining the status quo during the period when the administrative action on the application for reconsideration is undergoing its routine processing and completion.
>
> Since it is clear on the record that the continuation of patients in that nursing home during

that period would not be inconsistent with the continued health and welfare of the patients—in other words, none of the alleged complaints bear on any serious safety or health hazards—under all those circumstances the following Order is entered:

That the Temporary Restraining Order heretofore entered shall remain in effect pending completion of administrative action on the pending application for reconsideration and until the defendants give to the plaintiffs at least five days' written notice of their intention again to terminate funding.

It is understood that during this period the funding will not be curtailed or cut off and that the defendants will not systematically or otherwise intentionally remove patients from the home except in cases where that is the patient's own voluntary choice or in cases of medical necessity. In short, there will be attempt to simply transfer patients for the sake of putting them in some other place rather than this.

And it is understood that there will be no prohibition during this interim period against placement of additional patients at the home.

I believe that covers it, does it not?

Mr. Posner: It is satisfactory to me, sir.

The Court: O.K. Good luck with the administrative review. I hope it proceeds expeditiously.

Thank you all.

4. Thereafter, on September 9, 1977 Town Court received from the United States Department of Health, Education and Welfare ("HEW") notice that on August 4, 1977, the reconsideration referred to in Judge Fullam's Order was denied. A true and correct copy of the reconsideration decision and the letter of transmittal are attached as Exhibit "A" hereto.

5. On September 12, 1977 plaintiffs filed a motion for extension and renewal of the preliminary injunction.

6. On September 15, 1977 a hearing was held on the aforesaid motion. A true and correct copy of the transcript of that hearing has been separately filed. At the conclusion of that hearing, Judge Fullam issued a bench order and opinion as follows:

Fullam, J.:

I may state that the primary purpose of the Court in this proceeding is apparently not capable of being realized.

Let me comment upon the evidence which has been presented both at the previous hearing and today. I am absolutely convinced that nobody in the administrative end of HEW who is involved in this case so far as a party here has the faintest idea of what they are doing.

I am persuaded that somebody got all upset with very good justification about complaints of conditions which existed back in 1975, at the latest, or early in 1976, and about financial irregularities. It is absolutely clear to me that

anybody in his right mind would conclude that the patients at Town Court Nursing Home are better off there than they would be anywhere else in the foreseeable future.

I am satisfied that the evidence which has been presented this morning by the first witness sounded more like a memorized recitation than testimony about facts. It was full of sweeping conclusions and gobbledygook, which makes no sense. The ultimate conclusion was simply the alleged reconsideration of this case was a conclusion that there was adequate documentation or sufficient documentation to substantiate the issue.

It is obvious to me that the taxpayers would have saved a lot of money if instead of all the time that has been wasted in review of documentation and appearance here in this proceeding and somebody has simply gone over and looked the place over. It is quite apparent to me that people are much more interested in sustaining previously stated positions, in dotting I's and crossing T's, than they are in actually carrying out sensibly the very beneficial program having to do with nursing homes.

Having said all that, I nevertheless reluctantly conclude that in view of the position taken by the Government, a position which I frankly do not understand and never will, there is nothing that the Court can do about it.

If the administrative bureaucrats persist in being blind to facts, if they persist in looking

at documents instead of institutions, if they persist in looking at regulations instead of facts and events, there is nothing the Court can do about it.

It is obvious to me that the outcome of the administrative review is a foregone conclusion. But it is equally obvious to me this is a matter in the control within the administrative agency and not within the control of the Court.

Therefore, it seems to me the long and short of it is that the bureaucrats will wind up with having to stew in their own juice.

I have attempted to make it possible for them to review this matter and arrive at a solution which will be beneficial to the patients involved. That has not borne fruit. It will be up to them to cope with the needs of these patients in some fashion, which I hope will bring them to a realization of the problem.

The Motion for Continuance of the Preliminary Injunction is denied except as follows:

The defendants are restrained from disapproving Medicare and Medicaid payments to those patients who are in the Home now and otherwise entitled thereto, so long as they remain patients in the home.

The effect of this will be that the plaintiff, Town Court Nursing Home, is not to be required to maintain patients without their being entitled to Medicare payments for those patients who are there.

If the powers that be in the bureaucracy wish to move the patients out, that is their privilege. They are going to pay for them while they are there, and it will be up to them to arrange alternative locations for them.

All of this is denied and the preliminary injunction, of course, is without prejudice to a reconsideration of the matter by the appropriate officials if there can be anyone prevailed upon to have enough enlightenment to look at the current situation and make a current judgment and not look at papers and make a bureaucratic judgment based upon what is on paper and what may have existed in the past.

7. Later that day, a written order was issued which denied plaintiffs' motion and dissolved the preliminary injunction "provided, however, that the defendants shall not withhold payments for services actually provided to patients." A true and correct copy of that Order is attached as Exhibit "B" hereto.

8. Following the hearing, plaintiffs made oral application for a stay of the Court's Order which application was granted for a period of ten (10) days "to permit the plaintiffs to file a Notice of Appeal and seek a further stay from the Court of Appeals. To the extent that plaintiffs seeks a longer stay from this Court, the request is DENIED." A true and correct copy of the Court's Order dated September 15, 1977 is attached as Exhibit "C" hereto.

9. On September 16, 1977 notices of appeal were filed by both Town Court and the patient-plaintiffs.

II. PARTIES

10. Town Court operates Town Court Nursing Center, a 198-bed skilled nursing care facility located at 1526 Lombard Street, Philadelphia, Pennsylvania.

11. Plaintiffs Emma Cooper, et al., are patients at Town Court who desire to remain at Town Court. Each plaintiff is a recipient of Medicaid benefits. The patient-plaintiffs have brought this suit on behalf of themselves and the other Medicaid recipients at Town Court.

12. The patients who occupy the beds at Town Court are primarily chronically ill elderly persons who average approximately seventy-five years of age. At present 193 of Town Court's 198 beds are occupied and 179 of the 193 patients at Town Court are participants in the Medicaid program.

13. Medicaid is a program of medical assistance to the indigent established by the laws of the Commonwealth of Pennsylvania, 62 P.S. §441 *et seq.*, and subject to federal regulations by reason of partial federal funding provided to state programs which comply with the federal regulations.

14. Defendant Frank S. Beal is sued individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania.

The Pennsylvania Department of Public Welfare is the state agency responsible for the certification of nursing homes as providers under the applicable state and federal law pertaining to the Pennsylvania Medicaid program. On May 20, 1977 Secretary Beal notified Town Court that effective July 18, 1977 all

funding to Town Court would be terminated and that Town Court's status as a provider was being terminated.

The notice further stated that the termination was the automatic result of the termination of Town Court's status as a Medicare provider by the United States Department of Health, Education and Welfare.

15. Defendant Joseph Califano, Jr. is sued individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare ("HEW").

HEW is responsible for the certification of nursing homes as providers under the applicable federal law pertaining to the Medicare program. Further, as referred to in the prior paragraph, federal regulations require that when a nursing home's Medicare certification is terminated by the federal authorities for the appropriate state agency, here the Pennsylvania Department of Public Welfare must in turn terminate the nursing home's certification under the Medicaid program.

On May 17, 1977 HEW gave Town Court a notice that its participation in the Medicare program was being terminated, in the same manner as set forth in the preceding paragraph, subject to reconsideration and hearing, if requested.

III. ADMINISTRATIVE REVIEW

16. Reconsideration of the HEW decision was requested by Town Court and, in connection therewith, Town Court forwarded to HEW a series of six reports on the conditions extant at Town Court.

17. As of the Court hearing on July 27, 1977 the reconsideration process had not yet begun.

18. However, by letter dated September 9, 1977, HEW stated that the reconsideration decision was made on August 4, 1977 and that reconsideration was denied.

19. Since September 9, Town Court has notified HEW of its intention to pursue all avenues of administrative review, including a hearing before an administrative law judge, which according to HEW's counsel, N.T. 108, will take from four to six months to complete.

IV. THE CASE LAW ESTABLISHES THE LIKELIHOOD OF PLAINTIFFS' SUCCESS ON THE MERITS

20. The overwhelming weight of judicial authority holds that nursing homes and their patients are entitled to injunctive relief against discontinuance of a home's status as a provider under Medicare or Medicaid until such time as administrative and judicial review of the administrative decision to terminate is exhausted. See, *e.g., Hathaway v. Mathews,* 546 F.2d 227 (7th Cir. 1976); *Klein v. Mathews,* 430 F. Supp. 1005 (D.N.J. 1977); *Ivy Nursing Home, Inc. v. Califano,* CCH Medicare and Medicaid Guide ¶28,470 (W.D. Pa. May 31, 1977).

21. Although the District Court has twice recognized that plaintiffs are entitled to injunctive relief, it erred in failing to maintain the status quo for the maintenance of the home until the administrative and judicial review processes are exhausted. *Maxwell v. Wyman,* 478 F.2d 1326 (2d Cir. 1973).

22. The District Court also erred in allowing into evidence a grand jury presentment which has not yet been the subject of any trial proceeding in which plaintiff Town Court has not had the opportunity to appear and defend itself and to cross-examine the witnesses against it. *See Great American Ins. Co. v. Pearson,* 220 Ala. 664, 127 So. 233.

V. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY UNLESS AN INJUNCTION IS GRANTED

23. By lifting the injunction against the involuntary removal of patients from Town Court, the District Court failed to weigh the effect upon these patients of any such transfer. The adverse effect of transfer has been labelled "transfer trauma" which recognizes the substantially increased possibility of illness and even death among this group of elderly and infirm persons. *Burchette v. Dumpson,* 387 F. Supp. 812, 819 (E.D. N.Y. 1974). *Hathaway v. Mathews, supra,* and *Klein v. Mathews, supra,* quoting HEW Technical Assistance Memorandum A.A-TA-75-1 (Feb. 19, 1975):

> There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases in mortality far in excess of what would normally be expected have been documented.

24. The continued operation of Town Court can be assured only when it has a sufficiently high level of occupancy to justify the economics of maintaining the large number of personnel and the substantial day-to-day expenditures necessary to maintain a high

quality of care and to comply with state and federal regulations.

25. Because of its location and the make-up of the available patient population, Town Court obtains few private patients. Thus, if no new Medicaid or Medicare patients can be referred to Town Court and the defendants are free to remove Medicare and Medicaid patients from Town Court, it will have a substantial number of empty beds.

26. Town Court presently receives $25.00 per Medicaid patient per day. As patient beds empty, this drop in income will compel Town Court to cease operating long before all Medicaid patients are removed.

27. The cessation of operations would irreparably damage Town Court's ability to hire and maintain personnel, obtain financing and satisfy the conditions for state licensure.

28. At all times prior to September 16, 1977, Town Court had at least ninety-seven percent (97%) occupancy and received a continuing flow of referral patients. No patient has left Town Court because of the conditions or quality of care therein.

VI. AN INJUNCTION WOULD NOT CAUSE SUBSTANTIAL HARM TO COME TO OTHER INTERESTED PARTIES

29. Both federal and state governments have a continuing financial responsibility to pay for skilled nursing care for persons in the Medicaid and Medicare programs, so long as such services are necessary.

Thus, wherever these patients are located, the federal and state expenditures will remain the same.

30. The federal and state interests in providing skilled nursing care of good quality and in safe surroundings here are satisfied at Town Court. The last state or federal inspection of Town Court occurred on June 22, 1977 when state inspectors recommended provisional licensure, a standard nearly identical to the standard of substantial compliance with Medicare and Medicaid regulations needed to maintain certification under these programs.

Further, there has been no allegation of any violation of the Federal Life Safety Code at Town Court. *Compare Hathaway v. Mathews, supra* at 231, *with Case v. Weinberger,* 523 F.2d 602 (2d Cir. 1975).

VII. AN INJUNCTION WOULD DO NO HARM TO THE PUBLIC INTEREST AND, IN FACT, WOULD FURTHER THE PUBLIC INTEREST

31. The Philadelphia community is confronted with a particularly acute shortage of skilled nursing home beds, particularly for Medicaid patients.

32. Town Court is one of the largest skilled care facilities in Philadelphia and there are no skilled care beds available in other facilities for Town Court's present patient population.

33. The public interest would be served by continuing the possible use of Town Court for so long as the law allows. In the absence of injunction, this public interest would be ignored.

VIII. CONCLUSION

For these reasons, supported in all respects by the findings of the District Court, an injunction should be issued to maintain the status quo during the pendency of these appeals.

(s) Nathan L. Posner
Nathan L. Posner
Jeffrey B. Albert
Attorneys for Town Court Nursing Center, Inc.

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

(s) William F. Coyle
William F. Coyle
Attorney for Emma Cooper et al.

AFFIDAVIT

Commonwealth of Pennsylvania
County of Philadelphia ss

I, Donald Lewis, N.H.A., being duly sworn, do hereby state and aver that I am the licensed administrator of the nursing home operated by Town Court Nursing Center, Inc., that in my opinion the present condition of the home is excellent and presents absolutely no hazard to the life or safety of any patient therein, that I am authorized to take this affidavit on behalf of all appellants in this litigation, and that,

to the best of my information, knowledge and belief, all of the averments within the attached motion are true and correct.

(s) Donald Lewis
Donald Lewis

Sworn to and subscribed before me this 26th day of September, 1977.

Mary Frances Donohae
Notary Public
Philadelphia, Philadelphia Co.

My Commission Expires February 6, 1978

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania

September 9, 1977

Re: *Town Court Nursing Center, Inc. v. Califano* C.A. No. 77-2474

Office of the
Regional Attorney
Mailing Address
PO Box 13716
Philadelphia,
Pennsylvania 19101

Judge John P. Fullam
Rm. 15614
United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Fullam:

Enclosed is a copy of the notice of reconsideration determination to be issued by the Bureau of Health Standards and Quality of the Health Care Financing Administration, on September 14. Pursuant to your directive, we are notifying the plaintiffs five days in advance of the date of its issuance.

The reconsideration determination was reached on August 4, and received by the Bureau of Health Standards and Quality, Regional Office, on August 18. However, we thought it best to delay issuance of the notice until your return.

Sincerely yours,
Stephanie W. Naidoff
Regional Attorney

By:_____
Margaret M. Hathaway
Assistant Regional Attorney

cc: Jeffrey B. Albert, Esquire
William F. Coyle, Esquire
M. Faith Angell, Esquire
Jennifer Stiller, Esquire
Robert DeLuca, Esquire

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania 19101

September 14, 1977

Health Care Financing
Administration
Mailing Address
PO Box XXX 8450
Philadelphia
Pennsylvania 19101

Refer to: HSQ-R3 (10) rez
Town Court Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Attention: Donald B. Lewis,
Administrator

Dear Mr. Lewis:

This is in reply to your Request for Reconsideration of the decision of non-renewal of your Title XVIII (Medicare) provider agreement.

Your request, and supporting documentation, was forwarded to Health Care Financing Administration, Health Standards and Quality Bureau, Office of Standards and Certification, Baltimore, Maryland, for review.

The Office of Standards and Certification has determined that the decision of non-renewal was correct and that the documentation submitted contained no basis for reversing the decision of non-renewal.

Therefore, the decision of non-renewal is affirmed.

If you do not believe this decision to be correct, you may request a hearing before an administrative law judge of the Social Security Administration. A written request for a hearing must be filed no later than 60 days after the date of this letter. Such a request may be made to this office or as outlined in 20 CFR 405.1530 and 405.1531.

Sincerely yours,

(s) Gerald F. Szucs/Ph.D.
Gerald F. Szucs, Ph.D.
Acting Director, Health Standards and Quality Bureau

XIV.

ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 77-2221 and 77-2222 September 21, 1977

TOWN COURT NURSING CENTER, INC. AND COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

vs.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, and CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare Town Court Nursing Center, Inc.,

Appellant, No. 77-2221

Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants, No. 77-2222

(D. C. Civil No. 77-2474)

By: SEITZ, *Chief Judge,* and BIGGS and HUNTER, *Circuit Judges.*

Appellants' motion for injunction pending appeal, and to enjoin and restrain Defendants, Frank S. Beal and Joseph A. Califano, Jr., each of them, their agents, attorneys, deputies, employees and successors, from (a) systematically or otherwise intentionally removing patients who are eligible for Medicare or Medicaid benefits from Town Court Nursing Center, Inc.'s skilled care facility at 1526 Lombard Street, Philadelphia, Pennsylvania, except in cases where that is the patient's own voluntary choice or in cases of medical necessity; and (b) prohibiting placement of additional patients at the aforesaid facility, and Appellants to file security in the amount of $100.00, *and* for the Court's information, copies of D. C. transcript of September 15, 1977, and D. C. transcript of July 26 and 27, 1977 Preliminary Hearing, the above-entitled cases.

Respectfully,
(s) (Illegible)
Clerk

The foregoing Motion is granted pending further order of the court.

By the Court,
(s) (Illegible)
Judge

Dated: September 23, 1977

XV.

OPINION

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

AND

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

AND

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc., Appellants in No. 77-2222

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare, Appellant in No. 77-2444

Appeal From the United States District Court for the Eastern District of Pennsylvania

(D.C. Civil No. 77-2474)

Argued January 4, 1978

Before: Seitz, *Chief Judge,* Gibbons and Garth, *Circuit Judges.*

Resubmitted In Banc July 10, 1978

Before: Seitz, *Chief Judge,* and Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth and Higgenbotham, *Circuit Judges.*

(Opinion filed September 29, 1978)

William F. Coyle, Esq.
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Philadelphia, Pa. 19110
Attorney for Emma Cooper, et al., Appellants in No. 77-2222

Maria Parisi Vickers
Asst. Att. Gen.
Michael von Moschzisker
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206 State Office Building
Philadelphia, Pa. 19130
Attorneys for Frank S. Beal, Appellee in No. 77-2222
David W. Marston
United States Attorney
Walter S. Batty, Jr.
Chief, Appellate Section
Robert N. Deluca
Chief, Civil Division
3310 United States Courthouse
Philadelphia, Pa. 19106
Attorneys for Joseph A. Califano, Jr., Appellee in No. 77-2222 and Appellant in No. 77-2444

Of Counsel:

Stephanie W. Naidoff
Regional Attorney
Margaret M. Hathaway
Assistant Regional Attorney
Department of Health, Education and Welfare
P. O. Box 13716
Philadelphia, Pa. 19106

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

Aldisert, *Circuit Judge*, with whom *Circuit Judges* Gibbons, Weis, and Higginbotham join.

Appellants in No. 77-2222, a proposed class action which was consolidated with *Town Court Nursing Center, Inc. v. Beal*, decided today, — F.2d—— (3d Cir. 1978), are six residents at the Town Court Nursing Center who contend that their due process and statutory rights would be violated by termination of Medicaid funding to the nursing home without a pre-termination hearing. Because the district court made no class-action determinations, we treat this as the appeal of the named patients only. They have appealed from an order of the district court denying their motion to extend portions of a preliminary injunction entered during an earlier phase of the litigation.

They had requested a preliminary and permanent injunction to prevent the defendants, "prior to a final determination of all appeals by Town Court Nursing Center, Inc.," from (a) terminating Town Court's Medicare and Medicaid certification; (b) removing eligible patients from Town Court; (c) discontinuing or withholding reimbursement for the care of Medicare and Medicaid patients; and (d) prohibiting future placement of other Medicaid-eligible patients at Town Court.

The district court issued a temporary restraining order on July 21, 1977, enjoining the defendants

from discontinuing or withholding reimbursement for care provided to eligible patients, pending reconsideration by HEW of a preliminary decision to terminate Town Court's provider status. Following a hearing, the district court granted the preliminary injunction sought by plaintiffs. The injunction by its terms was to remain in effect pending completion of the HEW reconsideration process, and until five days after the defendants gave plaintiffs written notice of their intention again to terminate Town Court's provider status. After HEW officials notified Town Court that they had affirmed the initial decision to terminate its Medicare provider status, Town Court and the six individually named appellants sought an order extending the preliminary injunction pending an evidentiary hearing and full judicial review. A hearing on this motion was held on September 15, 1977, after which the district court denied plaintiffs' motion to extend those parts of the preliminary injunction that enjoined removal of patients and that enjoined defendants from prohibiting the placement of new patients. We granted an injunction pending appeal that continued in effect those portions of the preliminary injunction that the district court had refused to extend.

Appellants first allege that they will suffer a de facto loss of Medicare benefits without the protection of a prior hearing if they are subjected to the physiological and pyschological harm caused by transfer from Town Court. Second, they believe they have a protected property interest in continued occupancy at Town Court so long as Town Court remains in compliance with the applicable statutes and regula-

tions. Consequently, they say that it was an infringement of these interests not to provide an evidentiary hearing and to allow for judicial review prior to decertification of the nursing center and prior to the de facto terminations of their "rights."

In another case decided today we held that

> [b]ecause a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.

Klein v. Califano, — F.2d —, — (3d Cir. 1978) (typescript opinion at 13). We believe the holding in *Klein* to be controlling as to the issues raised by these appellants. We therefore remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra,* and *Klein, supra.*

In No. 77-2444, Secretary of the Department of Health, Education and Welfare Califano has cross-appealed from that portion of the district court order which required that he "not withhold payments [from Town Court Nursing Center] for services actually provided to patients." *Town Court Nursing Center, Inc. v. Beal*, No. 77-2474 (E.D. Pa., Sept. 15, 1977) (order extending preliminary injunction

in part and dissolving preliminary injunction in part). Because Medicaid certification and funding is so inextricably interrelated with federal administrative action through HEW, *see Town Court, supra,* — F.2d at — (opinion at 5-10) and in view of our holding that the residents of the nursing center have a right to a pre-termination hearing, that portion of the order from which Secretary Califano appeals will be affirmed.

The judgment of the district court in appeal No. 77-2222 will be vacated and the cause remanded for further proceedings consistent with *Town Court, supra, and Klein, supra.* Costs taxed against appellees.

The judgment of the district court in appeal No. 77-2444 will be affirmed.

Adams, *Circuit Judge,* with whom Gibbons, Weis and Garth, *Circuit Judges,* join, concurring.

In recent years, the government has become increasingly involved in satisfying the medical needs of its citizens, and the Medicare[1] and Medicaid[2] programs form an integral part of this development. They represent congressional enactments for the benefit of the aged and poverty-stricken sick, those on the fringe of society. This legislation has placed the recipient in a dependent position in relationship to government, and created a situation where the recipient expects to receive the privileges which Congress has voted to provide.

[1] 42 U.S.C. §1395 et seq. and implementing regulations.
[2] 42 U.S.C. §1396 et seq. and implementing regulations.

Due process, which secures legitimate property interests from arbitrary government intrusion, protects many of the expectations that flow from such dependent relationship by requiring that government accord affected individuals the process that is due them before it takes a contemplated course of action that may deny such individuals the benefits they anticipate. But the imposition of due process procedures as a predicate to government action can result in reduced efficiency of government operations and the availability of fewer funds for the intended beneficiaries. Concern has been expressed that unless the procedures made available to affected individuals are carefully fashioned their societal cost would outweigh their benefit.[3]

In this case, the full Court is called upon to determine whether patients whose nursing home is about to be decertified as a qualified institution under the Medicare and Medicaid programs have any due process rights, and if so, the extent of such rights. The factual and procedural background of the controversy as well as the relevant statutory and regulatory provisions are set forth in the various opinions in the companion cases, *Town Court Nursing Center, Inc. v. Beal,* No. 77-2221 (3d Cir., Sept. 29, 1978), and *Klein v. Califano,* No. 77-1896 (3d Cir., Sept. 29, 1978). The appeal in this specific proceeding has been brought by six residents of Town Court

[3] *E.g.,* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1276 (1975).

Nursing Center who contend that their due process and statutory rights would be violated if they are not given an opportunity for a hearing before Medicaid funding to the nursing home is terminated. In opposition, HEW and the Pennsylvania Department of Public Welfare maintain that since termination of a facility's eligibility for Medicaid funding does not affect the patient's entitlement to reimbursement for medical care, the patients have not been deprived of any constitutionally protected property right by the decision to terminate.

The opinion announcing the judgment of the Court relies on the decision filed today in *Klein v. Ca[illegible]no*, No. 77-1869 (3d Cir., Sept. 29, 1978), to conclude that the Medicare and Medicaid laws and regulations grant patients a protectible property right to continued residency at the home of their choice absent specific cause for transfer, and that consequently due process requires that they be given an opportunity for a hearing before decertification of their facility. I concur in that determination, but believe it appropriate to set forth some additional thoughts so as to clarify further this position in view of Chief Judge Seitz's dissent.

Moreover, there has been no discussion of the procedures to which the patients are entitled under due process. In *Klein*, the procedural posture in which the issue was presented rendered moot any discussion of precisely what process was constitutionally mandated. Accordingly, the Court in that appeal stated, "We pretermit the issue of how extensive is the process due patients, such as the plaintiffs here, until a case presents us with a continuing live dispute." *Id.* at 18. It seems to me that *Town Court* is such a controversy. Nonetheless, the opinion announcing the judgment of the Court chooses not to discuss the issue, but rather to "remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra,* and *Klein, supra.*" Aldisert opinion at 5. Since I believe that in a situation such as this, an appellate court has the obligation to furnish guidance to the district court that may be utilized on remand,[4] this opinion shall also address the problem of what process is due the patients.

I.

An overriding consideration that a court must take into account when it confronts a procedural due process issue is the balance that is to be struck between fairness to the individual and effective government. On the one hand, the concept of due process embodies the law's fundamental respect for the dignity of the individual and its concern to shield him from the arbitrary whims of a government that overwhelms him both in size and power. On the other hand, government could be paralyzed if it were required to afford individuals who will be adversely

[4] *See* Geraghty v. United States Parole Commission, Nos. 77-1679 and 77-1858, slip op. at 25 (3d Cir., filed March 9, 1978). Without such guidance there exists the possibility that this Court's energies will be taxed unnecessarily by yet another appeal, and that the trial court may be required to duplicate its effort as well.

affected by its decisions lengthy procedural safeguards before it may implement such decisions. The Supreme Court has prudently instructed that these competing values be resolved by a two-step analysis.[5] First, it must be ascertained whether the private party has a constitutionally cognizable life, liberty or property right which is threatened by the government action. An open-minded approach towards recognizing such rights enables the law to afford individuals the protection that due process envisions in the multifarious situations in which they are affected by government decisions. Second, the precise protective procedure to which the private party is entitled before he is deprived of his right must be determined. Only at this second step should practical countervailing interests be taken into account to formulate procedures that are responsive to the interests of both the government and the private party. Such methodology, I believe, should control the treatment of the present case.

A.

A survey of the history of due process reveals a steady expansion in protected rights.[6] In large mea-

[5] *See* Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W., 4398, 4400, 4401 (U.S. May 1, 1978); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part); *id.* at 177, 186 (White, J., concurring in part and dissenting in part); *id.* at 207, 212 (Marshall, J., dissenting). For a historical sketch of the development of the two-step analysis, *see* L. Tribe, American Constitutional Law §10-8 at 507-08; §10-10 at 532-33 (1978).

[6] *See e.g.*, Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978) (public utility service); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits under Social Security Act); Gross v. Lopez, 419 U.S. 565 (1975) (public high school education); Wolff v. McDonnell, 418 US. 539 (1974) ("good time" credits towards a shortened jail sentence, and solitary confinement); Perry v. Sinderman, 408 U.S. 593 (1972) (teacher's employment tenure at state university); Morrissey v. Brewer, 408 U.S. 471 (1972) (conditional freedom following parole); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (state welfare benefits). ***But see*** cases cited in note 8 *infra*.

sure the source of this trend lies in the recognition that the distinction between those rights which a private party can claim against the government and those benefits to which he merely has a government granted privilege is untenable in a society where individuals are becoming ever more dependent on government "privileges" for their very subsistence.[7] The

[7] *See e.g.* Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404 (1963). For discussions of the erosion of the right-privilege distinction, see R. O'Neil, The Price of Dependency: Civil Liberties in the Welfare State (1970); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 Wash. L. Rev. 4 (1964); Powell, *The Right to Work for the State*, 16 Colum. L. Rev. 99 (1916); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-49 (1968); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 Duke L.J. 89; Note, *The Effect of Tenure on Public School Teacher's Substantive Constitutional and Procedural Due Process Rights*, 38 Mo. L. Rev. 279, 281-87 (1973); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. Rev. 1052 (1972).

fundamental concept undergirding due process—that an individual not be stripped of his dignity by being subject to the arbitrary whims of government—applies with equal force to privileges as to rights. Thus, it is now accepted doctrine that whenever an individual has a "legitimate claim of entitlement" that stems from state or federal law, regulation or practice, he may not be deprived of it without due process.[8]

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[8] Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In *Roth* the Supreme Court held that a teacher hired by a state university for a fixed term of one academic year did not possess a constitutionally protected interest in re-employment for the next year. Other cases that have dismissed claims of entitlement on the ground that in fact they merely expressed unilateral expectations that were not recognized by state or federal law include Meachum v. Fano, 427 U.S. 215 (1976) (transfer of prisoner to another state prison); Paul v. Davis, 424 U.S. 693 (1976) (police flyer identifying individual as a "known" shoplifter); Bishop v. Wood, 426 U.S. 341 (1976) (police officer employment). The insistence in these cases that the "legitimate claim of entitlement" be identified only by reference to positive law has been criticized by commentators as manifesting too narrow and rigid a conception of the rights guaranteed by the Constitution and as being internally inconsistent. See L. Tribe, American Constitutional Law §§10-10 & 10-11 (1978); Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977); Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process, in the Administrative State, id.* at 445; Tushnet, *The NewerProperty: Suggesting for The Revival of Substantive Due Process, 1975 Supreme Court Review 261;* Comment, *Entitlement, Enjoyment and Due Process of Law,* 1974 Duke L.I. 89; Comment *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano,* Harv. Civ. Rights Civ. Lib. L. Rev. 405 (1977); *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 86-104 (1976). However, in determining whether there is a protected property interest in the situation before us, we are bound by the guidelines enunciated by the Supreme Court.

The majority in *Klein* relies on three aspects of the Medicaid scheme[9] to establish as an initial proposition that a resident of a nursing home has "a legitimate entitlement to continued residency at the home of [his or her] choice absent specific cause for transfer."[10] First, reference is made to those provisions that guarantee that a person eligible for medical assistance under Medicaid may obtain medical services from any institution qualified under the federal program to perform such services.[11] Next, the opinion cites the regulations that ensure notice and a hearing to a recipient "who is aggrieved by an agency action resulting in suspension, reduction, discontinuance or termination of assistance."[12] Finally, the majority invokes the provision which states that a resident may be "trans-

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[9] In *Klein,* only termination of Medicaid reimbursements to the nursing home was at issue. In *Town Court,* on the other hand, HEW decertified the facility for Medicaid as well as for Medicare purposes. Nevertheless, *Klein's* treatment of the Medicaid provisions is equally apposite to the Medicare aspect of the *Town Court* litigation since at least two of the provisions of the Medicaid program that were relied upon in *Klein* have their counterparts in the Medicare statute and regulations. *See notes* 11-13 *infra.*

[10] Opinion at 12.

[11] 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The parallel provision in the Medicare scheme is 42 U.S.C. §1395a.

[12] 45 C.F.R. §205.10(a)(5); *id.* §(4)(i). The Medicare scheme guarantees similar procedural protections. 20 C.F.R. §404. 901 et seq. (1976); *see id.* at §405.701.

ferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay."[13] After inferring a property right from these clauses, the Court in *Klein* posits that "a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare,"[14] and consequently concludes that "Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare."[15]

In his dissent in this case, Chief Judge Seitz takes issue with the *Klein* majority regarding its premises and its conclusion. He finds unpersuasive any inference from the Medicaid plan of a property right that nursing home residents may assert in opposition to decertification of such facility. He notes that the first provision cited by the majority guarantees only that a recipient have the right to choose among *qualified* institutions; that the second provision ensures notice and a hearing only before termination or reduction in benefits, not before transfer from an unqualified facility; and that the third provision imposes upon the medical facility a standard of conduct with regard to transfer and discharge of individual residents and does not create any rights in the residents vis-a-vis HEW.[16]

[13] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

[14] Opinion at 13.

[15] *Id.* (footnote omitted).

[16] Opinion at 29.

This attempt by the dissent carefully to delimit the scope of the property right created by the three provisions, I believe, misses the thrust of the regulations and tends to trivialize the majority's approach in inferring a basis for the right to due process. Surely the majority does not intend to ground the property rights of the residents of Town Court on the regulation that requires notice and a hearing for the recipient prior to termination or discontinuance of Medicaid benefits. Similarly, the majority undoubtedly acknowledges that the provision that places limitations upon transfer or discharge is addressed only to the facility, not to HEW. However, when conjoined with the grant of freedom to choose among any qualified institutions, these regulations paint three distinct points in the landscape of a "legitimate claim of entitlement" that Medicaid beneficiaries can assert. Taken alone, the interest created by each of these clauses might be dismissed as not rising to the level of a cognizable property interest. However, when viewed together, they compel the conclusion that they identify three aspects of an "underlying substantive interest"[17] that enjoys the stature of "property."

What are the identifiable contours of this property right? First, it is evident that every Medicaid recipient has a protected right to uninterrupted receipt of benefits under the program. He or she may not be deprived of these payments without prior notice and an evidentiary hearing. Second, the regulations al-

[17] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398, 4400 (U.S., May 1, 1978).

low an elderly, infirm individual who seeks nursing home treatment freedom of choice in selecting the home of his or her preference so long as that home has qualified under the Medicaid program. Once confined in the home, the resident has a right to remain there and may be moved only under specific circumstances. The facility itself may transfer or discharge a resident "only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay."[18] The regulations do not explicitly specify any circumstances under which HEW may cause the removal of a resident from his chosen facility. However, at least two such situations are inherent in the regulatory scheme. HEW may instigate a resident's removal by terminating his benefits. Also, HEW may precipitate a resident's transfer to another home by decertifying the facility at which he presently resides, inasmuch as the regulation ensures only the freedom to choose among qualified institutions. This last aspect of the property right is implicated in *Klein* and *Town Court.*

The Supreme Court has repeatedly stated that "some kind of hearing is required at some time before a person is finally deprived of his property interest." *Memphis Light, Gas & Water Division v. Craft,* 46 U.S.L.W. 4398, 4402 (U.S. May 1, 1978), *quoting Wolff v. McDonnell,* 418 U.S. 539, 557-58 (1974). *See also Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Inasmuch as the regulatory scheme invests each resident with a right to remain at the facility of his choosing so long as it qualifies under the plan,

[18] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

the decision to decertify the institution necessarily effects a deprivation of this right and entitles the resident to due process procedures.[19]

I agree with the dissent—as must my other colleagues—that nursing home residents have no right to choose or to remain in a non-qualified facility. But that begs the question, at least in the instant case. For this limitation on the residents' property right perforce has no bearing on the issue whether residents of a *presently qualified* facility—as were the Town Court residents at the time in question—must be given the opportunity to participate in deliberations that may lead to the facility's decertification. The continued existence of the residents' constitutionally protected property right to remain in the home of their choice hinges on whether the facility is qualified. And the residents here are seeking to present information touching on that issue. Consequently, due process mandates that before they are deprived of their right, the affected individuals be afforded the opportunity to be heard on the material factual issue of the home's qualification.[20]

[19] This conclusion is buttressed by the fact that the regulations already provide the patients with procedural safeguards in the two other situations where their removal from the facility of their choice is authorized, namely, when the facility seeks to transfer them, *see* note 13 and accompanying text *supra,* and when HEW terminates their benefits, *see* note 12 and accompanying text *supra.*

[20] This analysis rests solely on the limited property right established by the first provision cited by the *Klein* majority, 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The other two provisions referred to in *Klein* merely shed light on Congress's intent to create a property interest in favor of

In addition to disputing the existence of a property right, the dissent makes a number of arguments to support its contention that there is nothing "harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification."[21] First, the dissent attempts to distinguish the Town Court situation from the circumstances presented in the Supreme Court cases employed by the

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nursing home residents to remain in the qualified home of their choice.

Accordingly, the interpretation proffered herein does not necessitate making the assertion—made by the *Klein* majority—that decertification of a facility is tantamount to a decision to transfer an individual resident. Nevertheless, the analysis here suggests the fallacy in the dissent's refutation of the majority's assertion. The dissent concedes that the practical effect of decertification in most cases is the forced transfer of residents, but maintains that an analytical distinction exists because decertification focuses on the facility's substantial noncompliance with HEW standards. Since residents have no right to remain in an unqualified institution, the dissent reasons, " 'transfer trauma' . . . is subordinate to the threat posed to all residents by substandard conditions." Opinion at 30. As pointed out in the text, however, the dissent assumes as a premise the factual issue which the residents seek to contest, namely, whether the institution is unqualified within the meaning of the statute.

Obviously, inasmuch as the holding that residents of a nursing home who receive benefits under the Medicare or Medicaid programs are entitled to due process procedures before the home is descertified rests on this Court's construction of the governing regulations, the decision is limited to such patients. The rights of other patients—such as those hospitalized for mental illness or retardation in state institutions—is dependent upon the language and intent of the provisions controlling their confinement.

[21] Opinion at 30.

majority[22] on the ground that decertification of an institution does not terminate or otherwise prejudice the rights of the residents to receive Medicaid benefits so long as they live in another, qualified facility. This distinction appears to be beside the point. Just as the right to Medicaid benefits is cognizable under due process, so too is the right to remain at the qualified facility of one's choice, and *this* right *has* been prejudiced by decertification of the facility.

Second, the dissent points out that since the institution has a vested interest in preserving its status under the Medicaid plan, it can be expected to adduce the best case for continued certification. And, the dissent continues, the institution is in the position to correct deficiencies and thus avoid termination. While these observations appear to be correct, they cannot obviate the need under due process to afford residents the opportunity to present *their* perceptions and perspectives on the issue of decertification. It seems to me to be a proposition fraught with danger —and indeed incorrect as a matter of due process analysis—to curtail the legitimate property rights of the residents simply because the residents are funded indirectly through payments to the nursing home, thus creating a property right in the institution as well. Rather, due process protections must be accorded equally to the "legitimate claims of entitlement" of the residents and to the institution.

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[22] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1974).

Third, the dissent suggests that the administrative procedures currently in existence adequately protect the interests of the residents. Chief Judge Seitz specifically takes judicial notice of a Pennsylvania Department of Health manual[23] which states that the required on-site predecertification survey "generally involves" interviews with residents,[24] and notes that the survey team consists of highly trained professionals. He also remarks that senile and incompetent residents would often be unable to participate in a due process hearing. Finally, the dissent raises the specter of administrative and judicial delays if residents are afforded participation rights "in all surveys and, presumably, in judicial review of their sufficiency."[25] Since these contentions appear logically to be directed to the *type* of due process procedure to which the residents are entitled, they are best treated in that context.

In sum, the Medicare and Medicaid programs appear to establish a "legitimate claim of entitlement" which must be accorded due process protection. However, even if a court were to conclude that the governing provisions do not on their face create such a property right, it would be required to construe them in a manner that fairly accords with the circumstances of the parties and with the underlying purpose of the due process clause. I believe that the result reached by a majority of this Court comports with that mandate. It would be difficult to contend that nursing

[23] Pennsylvania Department of Health, Long Term Care Facilities Surveyor's Orientation Manual (September 1976).

[24] *Id.* at III 8-9.

[25] Opinion at 32.

home patients do not have a strong interest in avoiding unnecessary transfers. Many of them have been uprooted from the communities in which they spent their working lives. For most of these patients, the limited world of the nursing home is the only community in which they retain a stable network of personal and social relationships. In addition, invalids and prospective invalids alike have a strong interest in avoiding the unnecessary physical hardship that could result from a mistaken transfer. These "home" and "health" interests, I submit, are among those that most persons would regard as being encompassed by the protections of the due process clause.

Also, we may take judicial notice of the fact that the plaintiff patients in these cases are physically weakened, economically disadvantaged, and often without significant contact with or control over the "outside community." Economic need and physical incapacity appear to have forced them to seek support from the government. They thus are members of a class of persons to whom the enforcement of essential procedural protections through a non-majoritarian branch of the government is of special importance.[26] For us to construe the controlling provisions strictly against the patients in such circumstances would seem to violate elementary notions of fairness.

These practical factors, to my mind, are relevant and persuasive on the issue of whether the statute and regulations should be interpreted to create a protected property interest in this case. The majority's reading

[26] See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

of the statute fairly conforms to these underlying equitable concerns. Even if the dissent's strict construction were textually plausible, it is inconsistent with this more elemental understanding of the problem.

The kind of issue raised in this case is one that this Court will doubtless face again. Federal transfer payments, which are an enormous factor in total economic activity, have resulted in all sorts of new quasi-contractual relationships. They have thereby transformed, for millions of persons, the very nature of property. An occupant of a nursing home, for example, will in many cases have no property interest in this world other than the expectation of occupying a familiar room and seeing familiar faces. Because that expectation does not fit into a conventional legal pigeonhole like a leasehold for a term or a tenure of employment, many judges may be uncomfortable with the thought of affording it appropriate due process protection. But there is, it seems to me, more rather than less need for the recognition of minimum due process protections for the new forms of property which arise out of the increasing role of government in transfers of the fruits of the economy. We should be alert for and receptive to claims for due process protection of those new forms of property, and where the terms of the authorizing rules permit, we should be prepared to take a practical rather than a technical approach to such claims, whenever it is necessary to protect the dignity and autonomy of those who participate in wealth transfer programs.

B.

Once it is determined that the government is constrained from taking a particular action affecting private parties without according them due process of law, it is essential to ascertain what process is due. The principle that governs this second phase of the due process inquiry is to be contrasted with the inclusive approach towards identifying the rights that are entitled to due process protection. As the Supreme Court has instructed, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands". *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), *quoting Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).[27] Thus, practical considerations play a prominent role in fashioning the procedural safeguards that will implement the fundamental due process concern of preventing officials from arbitrarily interfering with private endeavors. The practical considerations reflect the recognition that the government must be able to function efficiently and expeditiously and that if scarce public resources are to be used optimally, the government cannot be unduly fettered in administering its programs by costly and time consuming bureaucratic procedures.[28] Therefore, in assessing what procedural safeguards are necessary before government may deprive a private party of a constitutionally protected interest, courts should be careful to require

[27] *See also* Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugees Comm. v. McGrath, 341 U.S. 123, 162-63 (Frankfurter, J., concurring).

[28] *See* Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976).

only the minimal protections mandated by due process, leaving the other branches of government free to determine the extent of the procedural protective mechanisms that will be authorized.[29] The constitutionality of a chosen scheme should be upheld if it permits the aggrieved party to air his views in such a manner that the risk of an erroneous determination by the government is reduced and the value of other, more burdensome procedures is outweighed by the cost and delay that they would entail.

This flexible framework for analyzing what procedural safeguards are mandated by due process has been clearly articulated in *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976).

> [R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra,* at 167-168 (Powell, J., concurring in part); *Goldberg v. Kelly,* at 263-266; *Cafeteria Workers v. McElroy,* at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved

[29] *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

> and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g., Goldberg v. Kelly, supra,* at 263-271.

When balancing the governmental and private interests to arrive at the process that is due, only once has the Supreme Court insisted on a full evidentiary hearing before the government decision in question became effective.[30] The Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970), held unconstitutional a procedure which provided for written submissions by the welfare recipient but no hearing before payments were cut off. In requiring that the welfare recipient be afforded a pre-termination full evidentiary hearing at which he can appear personally, offer oral evidence and confront witnesses, *Goldberg* recognized that

> "the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. This need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Id. at 264. (emphasis in original). The Court concluded that "the interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the state's

[30] *See* Mathews v. Eldridge, 424 U.S. 319, 340 (1976).

competing concern to prevent any increase in its fiscal and administrative burdens." *Id.* at 266.

In other cases before the Supreme Court, due process has been found to be satisfied by administrative procedures that did not include a full evidentiary hearing before the deprivation. Thus, where a private party sought to garnish property, the Court held that due process requirements were met if the garnishing party was required to initiate an *ex parte* proceeding before a neutral officer, supply an affidavit supporting the claim to the property, and post a bond, provided that the aggrieved party is given an opportunity to contest the seizure promptly thereafter. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Also, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court upheld the administrative procedures for dismissing a federal employee for cause, which included a copy of the charge and an opportunity to file a written response and to make an oral appearance before the dismissal, with an evidentiary proceeding only thereafter. Just last term the Supreme Court found that an informal administrative remedy whereby a customer whose municipal utility service was to be cut off for nonpayment of bills would be permitted to meet with "a responsible employee empowered to resolve the dispute" was sufficient to satisfy the dictates of due process. *Memphis Light, Gas and Water Division v. Craft*, 46 U.S.L.W. 4398, 4403 (U.S., May 1, 1978).

Of the recent Supreme Court pronouncements regarding the process that is due in various situations,

Mathews v. Eldridge[31] is most instructive for determining what protections must be accorded the patients in the instant case. In *Eldridge* the Supreme Court was faced with whether due process required that a recipient of Social Security disability payments be afforded an opportunity for an evidentiary hearing before his benefits were terminated. After carefully balancing the private[32] and public[33] interests as they were manifested in the situation before it and evaluating the fairness and reliability of the existing pretermination procedures,[34] the Court found that the

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[31] 424 U.S. 319 (1976).

[32] The Court determined that since the recipient is entitled to retroactive benefits if he ultimately prevails, his only interest is in the uninterrupted receipt of funds pending final disposition of his claim. 424 U.S. at 340.

[33] The Court mentioned "the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision," and noted the strong interest of the public "in conserving scarce fiscal and administrative resources", particularly since "the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving . . ." 424 U.S. at 347-48.

[34] The Court focused on the fact that in most cases the validity of the disability claim hinges on the evaluation of easily documented routine and unbiased medical reports, and concluded that since credibility is rarely an issue the reports could be assessed upon written submissions, as provided in the existing procedures. This was found to create a decided distinction between *Eldridge* and *Goldberg v. Kelly, supra*, in that oral presentation was deemed to be essential for a welfare recipient to communicate his case to the decision-maker in view of the low educational level of most recipients. 424 U.S. at 343-45.

elaborate administrative mechanism provided by the Social Security Administration[35] satisfied the mandate of due process, and that a full evidentiary hearing was not required. Noteworthy is the admonition with which the Court concluded its opinion:

> [T]he judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decisionmaking in all circumstances. . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See *Arnett v. Kenney*, 416 U.S., at 202 (White, J., concurring in part and dissenting in part).

424 U.S. at 348-49.

[35] Among other procedural safeguards, the administrative mechanism required the state agency which administered the program to evaluate periodically the recipient's continued eligibility. Its assessments were to be based on investigations performed by its own medical and nonmedical personnel as well as upon information which it solicited from those who treated the recipient and from a detailed questionnaire from the recipient himself. Upon reaching a tentative conclusion that benefits should be terminated, the agency was required to provide the recipient with a summary of the evidence upon which it based its assessments, to afford him an opportunity to review his file, and to permit him to respond in writing and submit additional evidence. After the state agency made its final determination, it was to be reviewed by an examiner in the Social Security Administration Bureau of Disability Insurance and accepted by the Administration. Benefits were to be terminated two months after the month in which medical recovery is found to have occurred. The recipient is given the right to have the termination reviewed by different levels in the state agency, the Administration, and finally, the federal courts. If he prevails to any degree the recipient is entitled to retroactive payments. 424 U.S. at 336-39.

It is evident, in view of *Eldridge*, that the Town Court residents need not be afforded an evidentiary hearing before the decision to decertify the facility becomes final. *Eldridge* emphasized that the critical element that underlay *Goldberg's* requirement of a pre-termination evidentiary hearing was that without welfare benefits the recipient was left destitute, and would in all likelihood be unable to pursue his administrative remedies. This factor was found lacking in *Eldridge*[36] and is also absent from the situation in Town Court, where the patients will continue to receive Medicaid assistance after their transfer to other facilities. Consequently, no justification would seem to exist here for departing from the general rule that due process is satisfied by "something less than an evidentiary hearing,"[37] as long as the selected procedures "assure fair consideration of the entitlement claims of individuals."[38]

[36] 424 U.S. at 340-43.

[37] Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

[38] *Id.* at 349.

In determining what process is due the Town Court residents, it is helpful to place in perspective the purpose that will be served by such procedures. Obviously, the facility's residents cannot be expected to play a primary role in the decision to decertify. As the dissent points out, the main burden for presenting the case in support of continued certification must rest with the institution itself, since it has the greatest financial interest at stake and is in the better position to adduce relevant facts and to correct violations. Still, the facility's residents have a two-fold, unique interest that should be accommodated by the due process-mandated procedures.

First, the residents have a legitimate claim that they be permitted to supplement any data gathered from other investigative sources regarding the issue whether the facility qualifies under federal and state standards. On the basis of their first-hand experiences the residents can provide relevant information—which cannot be obtained from other sources—concerning the daily functioning of the institution as it affects them.[39]

[39] As the lower court in *Klein* aptly commented,

> While the court is deferential to the expertise of HEW, it is rank paternalism to suggest that patients who live in a facility, who have firsthand knowledge of the conditions, who are best equipped to describe how that facility has served them, cannot contribute to the process by which it is determined whether the facility meets federal standards. The court finds it hard to understand how HEW can seriously argue that the very patients whom HEW seeks to protect can have no purposeful role with respect to the condition of their environment.

Second, the residents should be allowed to bring to light other factors that ought to be weighed before a facility is decertified and its Medicare and Medicaid patients moved elsewhere. The distinction between qualified and unqualified homes is not marked by a bright line. Rather, an institution is decertified when, in the judgment of the federal and state administrators charged with reviewing its performance, it is not in "substantial compliance" with applicable standards and is unlikely to correct its violations.[40] As the Town Court proceedings indicate, a facility may technically be in noncompliance with the standards for a period of years before it is finally decertified.[41] In view of the discretionary nature of a decision to decertify an institution, it seems reasonable to conclude that where the patient transfer that inevitably accompanies decertifications would result in serious hardship or danger to the patients, the administrators probably would be reluctant to decertify the institution and would seek instead to alleviate the nonconforming conditions through alternative sanctions. For instance, if it were brought to the administrators' attention that ten patients were in an intensive care

Klein v. Mathews, 430 F. Supp. 1005 (D.N.J., 1977), *remanded with instructions to dismiss as moot*, No. 77-1896 (3d Cir., Sept. 29, 1978).

[40] 42 U.S.C. §1395cc(b)(2).

[41] Thus, despite various deficiencies, Town Court was able to maintain its status as a qualified facility from the time of its certification in 1967 until October, 1974, because it was still in "substantial compliance" and because it continually submitted plans of correction. Town Court Nursing Center, Inc. v. Beal, No. 77-2221, opinion at 10 (3d Cir., Sept. 29, 1978).

unit recovering from recent heart attacks and that moving them would endanger their lives, the decision-makers might decide to maintain the institution's certification on a temporary basis. The residents are entitled to an opportunity to present factors such as these which affect their right to remain at the qualified institution of their choice.

Besides the usual interests in reducing administrative burdens and other social costs, the government's interests in many ways complement those of the patients. Of prime concern to the government is the patients' well-being.[42] To this end the statutory scheme requires periodic inspections and evaluations of the facility.[43] Also, the patients' welfare necessitates expeditious action to close down facilities with dangerous conditions.

With this assessment of the interests of the patients and the government, the precise process that is due residents of an institution prior to decertification may now be outlined. The interests of the patients and the government can optimally be served by informal and flexibly-structured procedures whose purpose would be to permit the patients to provide relevant information on a decision that will have a major effect on their lives before that decision is made, while not unduly delaying or complicating the administrative process.

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[42] *Cf.* 45 C.F.R. §249.12(a)(1)(ii)(B) (4) (1976) (regulation permits facility to transfer patients only, *inter alia*, "for his welfare or that of other patients.").

[43] 45 C.F.R. §250.23 (1976). The statute limits accreditation of a facility to twelve months, 42 U.S.C. §1395cc(a)(1), thus necessitating annual surveys.

Since the patients are clustered at the facility and the information sought is within their knowledge, their participation could be solicited upon short notice. In fact, the procedure by which data is obtained from them could easily be incorporated into the present apparatus for investigating and surveying the institution.[44] As part of the numerous surveys that are conducted at the institution prior to decertification, the government representatives should therefore assemble the residents of the facility for an informal opportunity to express their views. At such occasion the government representative should explain the contemplated action, the reasons for it, and its potential effect on the patients. Then the patients should be asked to comment. This gathering should be supplemented with individual interviews with those patients who did not attend, since the reasons which prevented them from attending may also justify a determination that they should not be transferred. To ensure the greatest degree of input and to accommodate the needs of the various residents, they should be given the opportunity to present material both orally and in writing, and be offered assistance in formulating their responses.[45]

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[44] 45 C.F.R. §250.23(a)(3)(v) (1976) specifically requires that the medical review team inspection include "personal contact with an observation of each patient receiving assistance under the plan by a team member or members, and review of each such patient's medical record." *See also* text accompanying note 23 *supra* (dissent takes judicial notice of Pennsylvania manual stating that on-site survey "generally involves" interviews with residents).

[45] Allowing the patients this flexibility in choosing among alternative modes of communication appears to be mandated

The fact that many residents are physically or mentally too infirm to take advantage of any procedural machinery that would be established is an inadequate reason for not setting up a mechanism that will meaningfully represent their constitutionally-protected interests. If a patient is too sick to participate, he may be too sick to be transferred, and the investigators should be required to look into that possibility. Also, the needs of these unfortunate individuals can be presented by relatives, friends, or other representatives, who should be notified of such opportunity.

Carefully circumscribed procedures—as previously suggested—for protecting the rights of nursing home residents who receive benefits under the Medicaid program in remaining at the qualified institution of their choice, at least until it has been determined to be unqualified, would appear appropriate. The limited participation afforded by such an arrangement would not unduly impede the government's ability to take decisive and prompt action to ensure the welfare of the patients. It would not constrict the freedom of the other branches of the government by requiring the establishment of bureaucratic machinery or necessitating costly expenditures.

---

in light of the Supreme Court's discussion in Mathews v. Eldridge, *see* note 34 *supra*. Many of the elderly patients who reside in nursing homes may share with the welfare claimant in Goldberg v. Kelly the inability to communicate effectively in writing. Others may feel intimidated or embarrassed by their fellow residents' presence at the gathering and prefer not to disclose personal concerns. Still others may be both unable to communicate in writing and unwilling to speak in public, but would be willing to discuss their concerns in private interviews.

Moreover, it would not be required at the annual survey of the facility but only in the infrequent event that decertification of the facility is proposed, since only in that event do the regulations invest the residents with a protectible property right. Finally, it would not clog the courts, because patients who are transferred to a different facility as a result of a procedurally fair determination to decertify the institution at which they resided rarely will have any reason to question the administrative decision in a post-decertification court battle. Nevertheless, granting the patients this limited opportunity to air their concerns sufficiently reduces the risk of an erroneous deprivation of the rights of those who potentially are affected most seriously by the decision to constitute the process that is due them.

CONCLUSION

As often occurs in cases involving constitutional issues, the factual situation presented in Town Court may not be a particularly appealing one for expounding constitutional protections. The nursing home has a history of noncompliance with the governing regulations. It has been subject to a number of extensive investigations and had been afforded opportunities to correct deficiencies before it was finally decertified. Nonetheless, when a court is adjudicating constitutional principles, its view should not be obscured by the fact that one or the other litigant does not measure up to a particular standard. Although the government's decertification decision may eventually be

proven to be correct, that is not the point at issue in the patient's appeal. Rather, we have been asked to address the limited questions whether the governing regulations secure the right to residents of a facility presently qualified under Medicare and Medicaid to be heard before the facility is decertified, and if so, the extent of this right. I believe that in recognizing in the patients a right to participate while carefully limiting its content, an approach has been suggested that both enhances the values of due process and is practical in its application.

SEITZ, *Chief Judge*, dissenting.

Judge Aldisert's opinion relies on the majority opinion filed today in *Klein v. Califano*, No. 77-1896 (September 29, 1978, 3d Cir.). In this dissent, therefore, I primarily address the reasoning in *Klein*, with some reference to the concurring opinion herein.

Klein holds that due process requires that residents of an intermediate health care facility be given an opportunity for a hearing before decertification of that facility. Initially, the *Klein* majority postulates that HEW's regulations grant residents a "property right" not to be transferred without cause. As its minor premise, the majority asserts that an initial administrative decision to decertify an institution is tantamount to an order to transfer. We are to deduce, then, that Medicaid residents are constitutionally entitled to an opportunity to participate in the proceedings that may lead to an initial decertification. I cannot agree either with the majority's premises or with its conclusion.

The majority recognizes, as it must, that due process would place procedural constraints on HEW only if the residents' interests in continued occupancy enjoy the stature of "property." An independent source here the Medicaid law and regulations, must create the "underlying substantive interest" that is to be accorded this stature; federal constitutional law then determines whether that interest "rises to the level of a 'legitimate claim of entitlement' protected by due process." *Memphis Light, Gas & Water Di-*

vision v. Craft, — U.S. —, —, 98 S.Ct. 1554, 1560 (1978).

The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U.S.C. §1396a(a) (23), a Medicaid recipient may obtain medical care "from any institution . . . qualified to provide service or services required." Clearly, what the majority characterizes as a recipient's right to obtain medical care from a "freely selected provider" is limited to a choice among institutions which have been determined by the Secretary to be "qualified." Next, the majority's reliance on 45 C.F.R. §205.10(a) (5), ensuring a notice and hearing to a recipient whose benefits are suspended, reduced, discontinued or terminated, is obviously misplaced. As the majority itself notes, the decertification of these facilities did not reduce or suspend the residents' rights to continued benefits.

Finally, the majority relies upon 45 C.F.R. §249.12 (a) (1) (ii) (B) (4),[1] which establishes as one requirement for an institution's certification that each resident admitted to that institution be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay." The majority reads this provision as a limitation on the Secretary's power to interrupt a recipient's residence at a particular institution. Clearly,

[1] 45 C.F.R. §249 (1976) has been recodified at 42 C.F.R. §449 (1977). In conformity with the majority opinion all citations to that section will be to the earlier codification.

however, this provision is a standard of conduct imposed by the Secretary upon the provider. Violation of this standard is one of many grounds for decertifying the offending institution. *See* 45 C.F.R. §§249.33(a) (2), 249.10(b) (15). The provision creates no "substantive interest" in the residents vis-a-vis the Secretary.

Moving to its minor premise, the majority postulates that a decision to decertify is tantamount to a decision to transfer individual residents. Practically, of course, this may be a consequence in most cases, at least where an institution fails to remedy its insufficiencies. Analytically, however, the two decisions are different. Decertification focuses on the institution's noncompliance with HEW's standards. The majority does not and cannot contend that recipients have a right to remain in an institution that the Secretary has found, by appropriate procedures, to be in substantial noncompliance with the standards. "Transfer trauma," although a legitimate concern for some residents, is necessarily subordinate to the threat posed to all residents by substandard conditions.

Thus, a careful reading of the provisions cited by the majority reveals that neither statutes nor regulations grant the residents of an intermediate health care facility a "substantive interest" in decertification proceedings brought by the Secretary; hence, the residents have no constitutionally protected property right in uninterrupted occupancy.

The concurring opinion in this case concedes that "[t]aken alone, the interest created by each of [these provisions] might be dismissed as not rising to the

level of a cognizable property interest." Nonetheless, we are asked to agglomerate these "three distinct points" into a "landscape of a 'legitimate claim of entitlement.' " Each of the provisions governs an isolated and inapposite aspect of the program's administration. Their effect as a whole, then, cannot be greater than the sum of their parts. Nor is such infirmity rehabilitated by expressions of concern, in which I join, for the welfare of patients generally.

There is nothing harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification. Significantly, a decertification of a non-complying facility does not terminate or otherwise prejudice the rights of the residents to continued Medicaid benefits. Their benefits will be paid so long as they reside in an intermediate health care facility that complies with federal standards. This important fact immediately distinguishes the cases, employed by the majority in *Klein*, in which the individual involved suffered possible direct prejudice to some substantive liberty or property interest.[2]

Furthermore, and of substantial significance, there is resident input in the survey that must precede an initial decertification. We may take judicial notice of a document entitled "Long Term Care Facilities Surveyor's Orientation Manual" published in September 1976 by the Pennsylvania Department of

[2] *Memphis Light, Gas & Water Division v. Craft*, U.S. , 98 S.Ct. 1554 (1978); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Health. On pages III 8-9 of the Manual, in a section entitled "Survey Methodology," the Manual notes that an on-site survey "generally involves" interviews with residents. On page III-7 the Manual suggests that the surveyor at times may have to assume the role of "patient advocate."

A nursing home is not even initially terminated until elaborate proceedings conducted by professionals have resulted in a determination that the institution is not complying substantially with the provisions of its agreement with the Secretary. Here, the survey team consisted of two registered nurses, a dietician, and an equal opportunity development specialist. *See Town Court v. Beal*, No. 77-2221 (filed September 29, 1978, 3d Cir.).

While the Medicaid program itself has been enacted for the benefit of the residents, the survey proceedings are necessarily concerned with the applicable conditions of participation as set forth in the regulations. One should not lose sight of the fact, however, that the ongoing monitoring of participating health care facilities is primarily designed to protect the health and safety of the residents.

In many cases residents would not be in physical or medical condition to participate even minimally in a decertification hearing. Indeed, it is not clear what duties the majority in *Klein* would impose upon the Secretary where senile or incompetent residents are incapable of representing their own interests. Furthermore, since all such facilities must be surveyed annually, it is evident that the majority's position would require that residents be afforded "due pro-

cess" rights in all surveys and, presumably, in judicial review of their sufficiency.

The provider, of course, has a vested interest in "defending" his institution during any survey and so may be expected to adduce the best case for continued certification. Furthermore, he is the one who can correct deficiencies and thus avoid a termination.

Both the law and the facts dictate the conclusion that the mandated initial termination procedures do not deprive these residents of due process.

I would affirm the order of the district court refusing to extend portions of the preliminary injunction (No. 77-2222) and I would reverse the order of the district court continuing in effect part of the preliminary injunction (No. 77-2444).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

and

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education, and Welfare.

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI, and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants in No. 77-2222,

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare,
Appellant in No. 77-2444.

Before: Seitz, *Chief Judge*, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, and Higginbotham, *Circuit Judges*

XVI.

ORDER AMENDING OPINION

It Is Ordered that the printed slip opinion filed September 29, 1978 be amended as follows:

The following paragraph is added on page 32 at the end of the dissenting opinion:

Judge Rosenn and Judge Hunter join this dissent.

Collins J. Seitz
Chief Judge

Dated: October 13, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE, ET AL.,
Petitioners,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

XVII.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner (s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 7, 1979.

(s) Wm. J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 18 day of December, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE,

Petitioner,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

XVIII.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner (s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including February 26, 1979.

(s) William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 25 day of January, 1979.

Supreme Court, U. S.
FILED
JUN 11 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

(VOLUME II—Pages 191a-572a)

In the Supreme Court of the United States

Oct. Term, 1979

No. 78-1318

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE,

Petitioner

vs.

TOWN COURT NURSING CENTER, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

Petition for Certiorari Filed February 26, 1979

Certiorari Granted April 16, 1979

TABLE OF CONTENTS

PAGE

VOLUME I:

I. Docket Entries 1a

II. Verified Complaint 7a

III. Motions for Temporary Restraining Order and Preliminary Injunction 15a

IV. Order Dated July 21, 1977 ..... 22a

[Scheduled Hearing Transcript of Testimony and Exhibits Appear in Volume II.]

V. Defendant Beal's Motion To Dismiss 24a

VI. Defendant Califano's Motion To Dismiss 26a

VII. Plaintiffs' Motion for Extension and Renewal of Preliminary Injunction 28a

VIII. Opposing Affidavit of Claudette V. Campbell 30a

Attachment 1 ..... 36a

Attachment 2 ..... 54a

Attachment 3 ..... 58a

Attachment 4 ..... 61a

Attachment 5 .....108½a

[Hearing Transcript and Exhibits Appear in Volume II.]

IX. Order Dated September 15, 1977 ..... 117a

X. Further Order Dated September 15, 1977 118a

XI. Notice of Appeal of Plaintiffs, Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt 120a

XII. Notice of Appeal of Town Court Nursing Center, Inc. 122a

XIII. Motion for Injunction Pending Appeal 124a

XIV. Order of Court of Appeal Granting Town Court's Motion 142a

XV. Opinion Announcing the Judgment of the Court 144a

Concurring Opinion 150a

Dissenting Opinion 181a

XVI. Order Amending Opinion 187a

XVII. Order Extending Time To File Petition for Writ of Certiorari 189a

XVIII. Order Further Extending Time To File Petition for Writ of Certiorari 190a

VOLUME II:

XIX. Preliminary Hearing, July 26, 27, 1977 191a

PLAINTIFF, TOWN COURT NURSING CENTER, INC'S EVIDENCE:

Donald Lewis:

Direct Examination 196a

Cross-Examination 207a

Redirect Examination 216a

Tobias Bund:

Direct Examination 216a

Cross-Examination 221a

William J. Jones:

Direct Examination 222a

Cross-Examination 227a

John E. Cuminskey:

Direct Examination 229a

Cross-Examination 248a

Dr. Maurice E. Linder:

Direct Examination 251a

Cross-Examination 253a

Jesse Gaynor:

Direct Examination 254a

Cross-Examination 259a

Edward J. Zelkovitz:

Direct Examination 262a

Cross-Examination 263a

Redirect Examination 267a

DEFENDANT CALIFANO'S EVIDENCE:

Gerald Szuc:

Direct Examination 269a

Cross-Examination 282a

PLAINTIFFS' EXHIBITS:

1—Photograph, Cobbs Creek Nursing Home 290a

2—Photograph, Town Court Nursing Center 290½a

3—Letter Dated 5/20/77, to Donald Lewis, Administrator, Town Court Nursing Center, from the Commonwealth of Pennsylvania, Department of Public Welfare ... 291a

4—Letter Dated 5/17/77, to Town Court Nursing Center from the Department of Health, Education and Welfare 294a

5—Report by Professor Tobias Bund entitled "Analysis of Statement of Deficiencies Resulting from Survey Conducted March 8-11, 1977" 300a

6—Report by William J. Jones entitled "An Evaluation of the Town Court Nursing Center, June 1977" 318a

7—Report by John E. Cuminskey, Dated 6/28/77 ..... 343a

8—Report by Mr. Gaynor to Mr. Jones Dated 6/17/77 ..... 357a

9—Report by Mr. Gaynor to Mr. Coyle, Dated 7/19/77 ..... 365a

10—Report by Dr. Finkelstein to Mr. John W. Francks, Executive Director, Geriatric and Medical Centers, Inc., Dated 7/12/77 .. 369a

11—Letter from the Department of Health, Education and Welfare to Town Court Nursing Center, Dated July 19, 1976 .... 378a

DEFENDANTS' EXHIBITS:

1—Letter With Attachment Dated 5/26/77 to Donald Lewis, Administrator, Town Court Nursing Center, from Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare 380a

2—Letter Dated 6/23/77, to Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare from Donald Lewis, Administrator, Town Court Nursing Center 387a

3—Letter With Attachment Dated 2/7/77 to John Holbrook, Administrator, Town Court Nursing Center, Inc., From Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare 390a

4—Document Entitled "Statement of Deficiencies and Plan of Correction" for Town Court Nursing Center 400a

5—Document Concerning Town Court Nursing Center Entitled "Medicare/Medicaid Certification and Transmittal" 423a

6—Report Concerning Town Court Nursing Center Entitled "Medicare/Medicaid Skilled Nursing Facility Survey Report" 424a

XX. Transcript of Hearing Before Hon. John P. Fullam, J. on September 15, 1977 .... 495a

DEFENDANT'S EVIDENCE:

Claudette V. Campbell:

Direct Examination 501a

Cross-Examination 512a

Redirect Examination 518a

PLAINTIFFS' EVIDENCE:

Donald Lewis:

Direct Examination 522a

William J. Jones:

Direct Examination 523a

Cross-Examination 526a

Opinion and Order 531a

PLAINTIFFS' EXHIBITS:

12—Letter From Mr. Laff, Pennsylvania Department of Health, to Mr. Lewis, Administrator, Town Court Nursing Home, Dated July 29, 1977, With Attached Report 534a

13—Report From William Jones to Leonard Coyle, Undated 545a

DEFENDANTS' EXHIBITS:

7—Affidavit of Claudette V. Campbell ...30a, 550a

8—Document Entitled "Fourth Presentment" by the Special Investigating Grand Jury of April Term, 1976 Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section 551a

VOLUME II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.

v.

FRANK S. BEAL, etc., et al.,

Philadelphia, Pennsylvania
July 26, 27, 1977

Before Hon. John P. Fullam, J.

XIX.

PRELIMINARY HEARING

Appearances:

Fox, Rothschild, O'Brien and Frankel by Nathan L. Posner, Esq., Jeffrey B. Albert, Esq., for plaintiff Town Court Nursing Center, Inc.

Abrahams & Loewenstein by William F. Coyle, Esq., for Additional Plaintiffs

Faith M. Angell, Esq., Deputy Attorney General, for Secretary of Public Welfare—Commonwealth of Pennsylvania

Margaret Hathaway, Esq., Assistant Attorney General, for Secretary of the United States—Department of Health, Education and Welfare, Defendant

Jennifer A. Stiller, Esq., Assistant Attorney General, for Department of Health—Commonwealth of Pennsylvania

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(2) (Commenced at 2:09 o'clock p.m.)

THE COURT: This is the preliminary hearing of Town Court Nursing Center and others versus the Secretary of Health, Education and Welfare.

MR. POSNER: May it please Your Honor, before proceeding with the case, may I say that in support of Your Honor's feeling expressed at the session last week in that certain of the residents of the Town Court Nursing Home being plaintiffs in this case should require separate representation and we solicited on behalf of those persons Mr. Coyle.

Mr. Coyle is a member of our Bar, and we suggested to him that we would like to see him represent these persons. Obviously they couldn't seek counsel for themselves. As a result of that, Mr. Coyle did see these people, and he advised us, even though we agreed or offered to pay his fee, refused to accept the fee. I would like him to state to the Court his reason for being here this time, sir, if I may.

THE COURT: Certainly.

MR. COYLE: Good afternoon, Your Honor. If the Court pleases, I would like to disclose that our firm was approached by Mr. Posner's firm, I believe it was on Friday afternoon, because of the fact I think my late partner, Norman Kalcheim, has been for many years active in both the local and nationwide association for the aged. Mr. Kalcheim had been ill at the time and died, and our firm thought we should undertake the cause of these individual (3) plaintiffs. And my firm asked I be here and enter my appearance in their behalf.

I want to disclose to the Court there will be no compensation by Mr. Posner's firm to our firm nor have we asked for any compensation from the individual plaintiffs, nor do we anticipate there will be any conversation because these persons are indigent.

It is under those terms and conditions I have entered my appearance on behalf of the individual plaintiffs. I have directed copies of my appearance be sent to counsel for the defendants. That is the reason why I am here today, sir.

THE COURT: That is very much appreciated. I hope the defense will not prove that the laborer is not worthy of his hire.

MS. ANGELL: It became also clear during last week's conversations the Department of Health, not a named defendant, is certainly an integral part. Jennifer Stiller, Assistant Attorney General assigned to the Department of Health, is familiar with the case and is here under Rule 10 because she is not

a member of the United States District Court for purposes of this hearing.

THE COURT: She is a lawyer?

MS. ANGELL: A lawyer and a member of the Supreme Court of Pennsylvania.

THE COURT: Glad to have you.

MR. POSNER: Your Honor, she is a very good one.

(4) THE COURT: Time will tell.

Any other preliminaries?

MR. POSNER: The only other statement I would like to make to the Court at this time is that Your Honor at the conference last week again suggested that going forward you would like some testimony concerning the type of home to be operated in the future and the safeguards to be taken in the operation of the home.

THE COURT: I don't recall expressing any such preference, and I doubt if I have ever suggested it to a lawyer that I would like to hear testimony.

MR. POSNER: Possibly I am misstating it because I was not present, but I did think Your Honor believed that you would like to know concerning who would be—

THE COURT: It is obvious if you are to be afforded any relief at all that would only be on terms that would assure the continued welfare of the persons who are living at your establishment. That doesn't rule out the necessity of showing you are entitled to some relief of some kind.

MR. POSNER: I appreciate that, sir. I will proceed on that basis, sir.

During the course of testimony, sir, I will offer evidence; but at this time as to the factual situation —but at this time I did want to say to Your Honor there have been proceedings by a local Grand Jury with respect to Town Court Nursing Home, which mention may have been made to Your Honor. The charges (5) or the allegations contained in that presentment are a subject of defense by us, and there will be a complete denial of it.

However, sir, I would hope that these facts are not referred to today because I do believe my response should be made in response to any proceedings that might be made against us; and it being a matter now within the Court of Common Pleas of Philadelphia on the Quarter Sessions Court that we proceed on the basis of the present standards of the Home and the standards we hope to maintain in the future.

THE COURT: Well, I don't mean to preclude you from that, obviously; but I, once again, would point out I don't mean anything that I have said to dissuade you from the necessity of showing that you are entitled to relief on the legal issue; namely, that you are entitled to a hearing of some kind before the rights are terminated.

The record does not establish anything as to what notice you received, what opportunities for hearing you had, what the administrative proceedings are.

MR. POSNER: These are things I would like to go into sir, at this time.

THE COURT: Proceed.

MR. POSNER: And I will call to the stand at this time Mr. Donald Lewis.

DONALD LEWIS, sworn.

(6) *Direct Examination*

BY MR. POSNER:

Q. Mr. Lewis, you are presently occupying what position at Town Court Nursing Home?

A. I am the administrator, sir.

Q. And you have been administrator of Town Court for how long, sir?

A. Since January 1, 1977.

Q. Prior to that time, sir, what was your engagement with Town Court Nursing Home?

A. I was the assistant administrator from June of 1976 until December 31, 1977.

Q. Of what facility?

A. Of Town Court.

Q. Now—

A. Prior to that I had been in various other positions at various other medical Centers.

THE COURT: Were you at Town Court before June of 1976?

THE WITNESS: No, sir.

THE COURT: O.K.

BY MR. POSNER:

Q. Now, sir, you have been an employee of Geriatric & Medical Centers, which is the parent company of Town Court?

A. Yes, sir.

(7) Q. You have been an employee of theirs for how long?

A. Since June of 1972.

Q. And in your employment, sir, were you able to visit the various homes owned and operated by Geriatric through their subsidiary corporations?

A. Yes, I have, sir.

Q. And how many homes have you visited owned and operated by Geriatric?

A. Approximately seven or eight.

MR. POSNER: Mark these two for identification.

(Two photographs were marked Plaintiffs' Exhibits No. 1 and No. 2 for identification.)

BY MR. POSNER:

Q. I show you, sir, what has been identified here in the first instance as Plaintiffs' Exhibit 2 and ask you if you will identify that photograph (handing to witness).

A. This is Town Court Nursing Center, the old wing of Town Court Nursing Center.

Q. When you say "the old wing," will you explain to His Honor what you mean by that.

A. Well, there is an additional part of the building not pictured here that was completed in 1975.

Q. How much of an addition was that? By "that," I mean how many additional rooms, how much area covered, etc.?

A. 60 patient beds, sir. It would be three floors with (8) twenty patients on each floor.

Q. And looking at this picture and as this picture is now facing you, sir, would that be to the right or the left of the building noted on this picture?

A. It would be to the left.

MR. POSNER: May I show that to Your Honor?

THE COURT: Of course.

(P-2 handed to the Court by Mr. Posner.)

BY MR. POSNER:

Q. I show you now, sir, Plaintiffs' Exhibit 1 and ask you as to what the building is that identifies (handing to witness).

A. This would be the addition to Town Court Nursing Center similar to the additions—

Q. So that—

A. It says "Cobbs Creek Nursing Home" here, but I don't believe—

Q. What address is noted thereon?

A. 1526 through 36 Lombard Street.

Q. Is that the address of Town Court?

A. Yes, it is.

Q. And the name thereon is marked "Cobbs Creek Nursing Home."

Is that the name of one of the nursing homes of Geriatric?

A. Yes, it is, sir; but this describes the present Town Court, the new section.

Q. The new section.

May I show that to Your Honor?

(9) (Plaintiff's Exhibit 1 was handed to the Court by Mr. Posner.)

BY MR. POSNER:

Q. Can you describe for His Honor the number of rooms now contained in Town Court, the number of patients or residents handled at Town Court and the general description of the various departments that you have there, sir?

A. Yes, sir. We presently have 198 beds in the nursing facility occupied by 195 patients at the present time. Rooms will be 1, 2, 3, or 4 patients to each room. It is a modern fireproof structure built of concrete and steel.

We provide skilled nursing care, which is care that will require nurses, registered nurses on duty around the clock and other staff.

As well we provide rehabilitative services such as physical therapy and speech therapy. We have a Social Service Department, a Dietary Department, a Housekeeping Department, all the functions that would be necessary.

We have consultants in the areas of dietary, a dietician, a medical director, and so on.

Q. Would you tell us the approximate ages of the persons that are residents of Town Court. I know that is going to be difficult. Can you give us some idea of the average age?

A. Yes. I would say the average age is in the middle 70s.

Q. Now, sir, another difficult question for you, if I may.

(10) The length of stay of each of these residents at the Home once they are admitted is how long?

A. I would say it is approximately a year on the average.

Q. Now, sir, I would like to bring to the knowledge of the Court the present status of Town Court insofar as its standing with the Department of Welfare and its standing with the Health, Education & Welfare Department, HEW, of the United States.

Have you received a deficiency letter in the first instance from either the State or HEW?

A. Yes. We have received a letter from both the State and the Federal Government saying that funds would be cut off for Medicare and Medicaid on approximately June 18, I believe.

(Two-page letter dated May 20, 1977, to Donald Lewis, Administrator, Town Court Nursing Center, from the Commonwealth of Pennsylvania, Department of Public Welfare, marked Plaintiffs' Exhibit No. 3 for identification.)

(Three-page letter dated May 17, 1977, to Town Court Nursing Center from the Department of Health, Education & Welfare, marked Plaintiffs' Exhibit No. 4 for identification.)

MR. POSNER: Will you use my copies as I question the witness, Your Honor?

(Documents handed to the Court by Mr. Posner.)

BY MR. POSNER:

Q. I show you what has been described here as Plaintiffs' Exhibit 3 and ask you is that one of the decertifications that (11) were addressed to you? And for the sake of shortening the proceedings, that is addressed from the Commonwealth of Pennsylvania, the Department of Public Welfare; is that not correct (indicating)?

A. That is true, sir.

Q. And is there a date contained therein, sir?

A. The date of the letter is May 20, and it says it is effective June 18, that Town Court would no longer receive payments under medical assistance.

Q. That is in addition to everything else contained in the letter?

A. Yes, sir.

Q. Now, sir, I show you Plaintiffs' Exhibit 4 and ask you whether or not that is a decertification letter addressed to you from the Department of Health, Education and Welfare of the United States?

A. Yes, it is.

Q. And in effect, sir, does that contain the same type of notice or give it to us specifically, if you will.

A. Yes. The date of the letter is May 17, and it says, "That we are terminating your facility from participation in the Medicare program effective June 18, 1977."

Q. Have you ever at any time since the dates of those notices been advised of any life safety code violations that exist at Town Court Nursing Home?

A. No, sir, not to my knowledge.

(12) THE COURT: Excuse me. But, Mr. Posner, the letter, P-4, in the text on Page 2 refers to an attached survey and plan of correction.

MR. POSNER: I am going to get to that, sir. I will ask the witness concerning that.

THE COURT: All right.

BY MR. POSNER:

Q. His Honor has just referred to the statement contained in the letter referring to a survey. Are you familiar with that survey, sir?

A. Yes. This is a survey of March 8 through 11, 1977.

Q. And based upon that survey were there any life safety code violations noted therein?

A. Not to my knowledge, no, sir.

Q. Now, since that time, sir, has there been any review by the federal authorities? I will get to the State in just a moment.

A. By the federal authorities, no, sir.

Q. Since that time, sir, has there been any survey by the Department of Public Welfare, the State of Pennsylvania?

A. Yes, sir.

Q. When, sir?

A. The State of Pennsylvania, Department of Health, was in during the first week of May a day and they were also in on June 22.

The Department of Public Welfare, medical review (13) team, was in, I believe, the first and second month—the first or second week of May.

Q. Since the receiving of those notices both from the Department of Welfare and from HEW, do you know whether or not an appeal was taken from that decertification by the proper authorities of Town Court Nursing Home?

A. Yes, sir. To my knowledge appeals have been taken.

Q. And has a hearing been set by HEW based on that appeal?

A. Not to my knowledge. I have received no word of any.

Q. Are you aware, sir, of the early May review by the Department of Welfare as to whether or not that was satisfactory or unsatisfactory?

A. Yes. We did receive notification, and through the exit interview everything appeared to be essentially satisfactory.

Q. Was there a Department of Health review on the question of proper licensing of Town Court?

A. Yes. There was a review on June 22 of this year.

Q. And do you know the results of that review?

A. I got no—I received no written response as to that; but as to the exit interview that was given to us apparently it was essentially satisfactory.

Q. Now, sir, since March of 1977, what changes have you initiated or supervised at Town Court? Let me put it to you specifically.

Insofar as personnel is concerned, have you added (14) personnel and in what areas?

A. Yes, sir, we have. We have added personnel in the area of nursing, essentially in the area of registered nurses and licensed practical nurses.

THE COURT: There is no such thing as an area of registered nurses. I don't know what you are talking about. You mean you didn't have enough registered nurses before and how you have enough or what?

THE WITNESS: No, sir. We have hired additional registered nurses.

THE COURT: How many?

THE WITNESS: Approximately three or four.

BY MR. POSNER:

Q. And how many additional practical nurses?

THE COURT: Excuse me. You are the administrator, and you can't tell me whether you have hired three or four?

THE WITNESS: Well, sir, the reason for that would be some of the people are part-time. It would be the equivalent of three or four full-time employees.

BY MR. POSNER:

Q. Now, sir, dealing with the original survey made prior to the decertification notice by HEW, have you attempted to make any corrections in order to comply with any deficiencies that they may have stated in that notice?

A. Yes, sir. We have attempted to comply, and I believe we (15) have complied with all the deficiencies that have been noted.

We have taken action on every item that was listed.

Q. And have you invited the Federal Government through HEW to review that situation?

A. Yes, sir, we have.

Q. Now, sir, in addition to the hiring of these people and the corrections that you have made, did you employ any experts in order to aid you and management in determining a course to follow as far as Town Court is concerned?

A. Yes, sir. We have hired a great number of experts in the field.

Q. Would you tell His Honor who they are.

A. Yes. We have hired Dr. Toby Bund.

Q. He is in court today, is he not?

A. Yes, sir.

Q. Who else?

A. Mr. Jones, who is an expert in nursing home administration; Mr. Cumiskey, who is a nurse and has had a great deal of experience in nursing homes. We hired a pharmacy consultant.

Q. Now, so that we do not confuse the situation, when you said you have hired them we are not talking about full-time hiring, are we?

A. No, sir, we are not. We have hired them as consultants to give us advice in various areas and what course of action to take.

Q. Under the notices from HEW and consequently of the (16) Commonwealth of Pennsylvania, Department of Welfare, has there been a cutoff of funds as of recent date?

A. No, sir. I have received no cutoff of funds. The funds to date have been coming in as they normally would as far as the Medicaid program.

As far as the Medicare program goes, we have no patients at the present time in the facility under Medicare. So I cannot say on them.

Q. We are talking about monies due for care of patients up to what time, sir, that is still coming in?

A. We have received payment through May of 1977.

Q. According to the notices, the cutoff was July 18, was it not?

A. Yes, sir.

Q. And you have received no payment since that time, and are you ready to assume that the notice contains a cutoff date?

A. Yes. It says we would not receive funds for patients after that period.

Q. Now, sir, because of a fund cutoff as of that date, could you estimate the losses to Town Court Nursing Home on a per-day basis?

A. On a per-day basis, I would estimate that we would lose approximately $25 per patient for 200 patients. That would be approximately $5,000 a day.

Q. And under those circumstances if funding is not secured (17) from the Federal Government, will you be able to continue the operation of Town Court?

A. No, sir, we cannot operate.

Q. Do you know of any beds in this area that could house these patients or residents?

A. No, sir, I do not.

MS. ANGELL: Your Honor, I object to that question. I don't think that is within his qualifications.

THE COURT: I am sorry, I can't hear you. Even if I could, there is nothing to rule on. You haven't objected yet.

MS. ANGELL: I object as to his competence to answer the question as to whether there are available beds.

THE COURT: It just establishes his knowledge, which doesn't prove anything much.

BY MR. POSNER:

Q. In your opinion, sir, as a licensed administrator of a nursing home, are the services being provided at Town Court the services in accordance with all rules of the Department of Health and for the safety of the patients that are housed in that institution?

A. Yes, sir.

MR. POSNER: Cross-examination.

Cross-Examination

BY MS. ANGELL:

Q. Mr. Lewis, I believe you in testimony mentioned two investigations by the Department of Public Welfare; is that correct?

(18) A. Recently?

Q. Recently.

A. Yes.

Q. One in December of '76 and one in May of '77; is that correct?

A. That is correct.

(Five-page letter with attachment dated May 26, 1977, to Donald Lewis, Administrator, Town Court Nursing Center, Inc., from Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare, marked Defendants' Exhibit No. 1 for identification.)

(Two-page letter dated June 23, 1977, to Roger A. Cutt, Commissioner for Medical Pro-

grams, Commonwealth of Pennsylvania, Department of Public Welfare, from Donald Lewis, Administrator, Town Court Nursing Center, marked Defendants' Exhibit No. 2 for identification.)

(Eight-page letter with attachment dated February 7, 1977, to John Holbrook, Administrator, Town Court Nursing Center, Inc., from Roger A. Cutt, Commissioner for Medical Programs, Commonwealth of Pennsylvania, Department of Public Welfare, marked Defendants' Exhibit No. 3 for identification.)

BY MS. ANGELL:

Q. I show you what has been marked D-3 and ask you to indicate what this is. Have you ever seen it before (handing to witness)?

A. Yes, ma'am, I have.

(19) Q. What is it?

A. This is a letter received by Town Court on February—the letter dated February 7, 1977, referring to the medical review that took place December 14 through December 17, 1976.

Q. Does it not in fact list deficiencies that were noted on the December visit by the Department of Public Welfare and requests that a plan of correction be determined for them?

A. It says observations, findings, and recommendations, and a plan of correction was submitted.

Q. Pursuant to this investigation—to this examination by DPW; is that correct?

A. That is correct.

Q. I show you what has been marked D-1 and ask you whether you have seen that before (handing to witness).

A. Yes, I have.

Q. What is that?

A. This is a letter dated May 26, 1977, referring to a medical review followup visit that was made at Town Court May 9, 10, and 11, 1977.

Q. Does this not again also list a series of deficiencies at Town Court and request there be corrections made?

A. I would say there is a list of recommendations for the most part.

Q. Recommendations based on what?

A. Based on their survey.

(20) Q. Which indicates certain deficiencies?

A. Well—

THE COURT: The letter will speak for yourself. What he says about it isn't going to change it.

BY MS. ANGELL:

Q. Last I show you a document which has been marked D-2 and ask you to identify this (handing to witness).

A. Yes. This is my response to the letter dated May 26, 1977.

Q. And that in fact outlines how you plan to handle the recommendations or deficiencies?

A. Yes, ma'am.

THE COURT: What is the date of D-2?

THE WITNESS: June 23, 1977.

BY MS. ANGELL:

Q. Now you indicated, Mr. Lewis, in fact medical assistance funds have not terminated as yet?

MR. POSNER: That is objected to, sir.

THE COURT: Overruled. This is cross-examination.

THE WITNESS: To my knowledge I have seen no—the only thing I have to go by is the letter received.

BY MS. ANGELL:

Q. There has been no cessation for the actual funding?

THE COURT: He is still getting money for the care provided before May; is that correct?

(21) THE WITNESS: Yes.

BY MS. ANGELL:

Q. How many medical assistance, total bed count —of 198, how many medical assistance?

A. Approximately 180.

Q. The rest are what status?

A. Private care.

Q. What is your per diem rate?

A. For medical assistance patients?

Q. Yes.

A. 24.96 per day.

Q. You indicated there were a series of hired experts that have been secured for the institution; is that correct?

A. Yes, ma'am.

Q. Are they presently at the institution? Do they now perform any duties at the institution?

A. Not on a day-to-day basis, no, ma'am.

Q. Well, what kind of basis are they hired under?

MR. POSNER: If the Court please, I can save time by offering these witnesses. As soon as Mr. Lewis is finished they can be questioned.

THE COURT: Well, that is very good, but I think she is entitled to hear from Mr. Lewis his understanding also.

Objection overruled.

What is the basis on which they are hired?

(22) THE WITNESS: Yes. These people have been hired to do an evaluation of Town Court.

THE COURT: Hired on a flat-fee basis, so much per hour, so much per day, or what?

THE WITNESS. Some by hour, some by day, sir. They have come in and given us written reports on their findings of Town Court.

BY MS. ANGELL:

Q. So they already made an examination of Town Court?

A. Yes, ma'am they have.

Q. I see.

What action, if any, would you take as a result of their recommendations?

A. I would take their recommendations under consideration and act upon them, if necessary.

THE COURT: I wonder if anybody realizes how idiotic it is thus far. All we have heard so far are general conclusory statements from everybody.

I don't know what it is all about. I don't know what recommendations we are talking about. I don't know what action he is going to take. I don't know anything about what requests were made by the State. I don't know anything about the case. I have been sitting here for almost an hour. I would hope somewhere along the line people will start getting specific.

BY THE COURT:

(23) Q. When did you hire these experts? When did you get a report from them? What do they want you to do? And when are you going to do it?

A. These experts were hired in May of 1977.

Q. After you got the termination letter, I assume; is that right?

A. Approximately around that time.

Q. What have they recommended that you do?

A. Most of their recommendations—most of their findings were that the conditions at Town Court were satisfactory as far as the patient care is concerned, as far as the services provided at Town Court are concerned.

THE COURT: Proceed, Mrs. Angell. I am sorry.

MS. ANGELL: I have no further questions. I defer to Ms. Hathaway.

(23-page document entitled "Statement of Deficiencies and Plan of Correction" for Town Court Nursing Center was marked Defendants' Exhibit No. 4 for identification.)

BY MS. HATHAWAY:

Q. Mr. Lewis, can you identify that document for me, please (handing to witness)?

MR. POSNER: I am sorry, but I can't hear you, Ms. Hathaway.

THE COURT: She asked a non-surprising question: "Can you identify that document?"

(24) You may stand anywhere you are comfortable.

MR. POSNER: Thank you, sir.

THE WITNESS: Yes. This is a statement of deficiencies and plan of correction for the survey that was done by the Department of Health of Pennsylvania, on March 8 through 11, 1977, and the plan of correction submitted by myself on April 14, 1977.

BY MS. HATHAWAY:

Q. Now, this is a federal form, Mr. Lewis?

A. Yes, it is.

Q. Who prepared the lefthand column of this form?

A. The lefthand column was prepared by the Department of Long-Term Care—the Department of Health, Division of Long-Term Care, State of Pennsylvania.

Q. Who completed the righthand side of the form?

A. I did.

Q. You did yourself?

A. For the most part, yes, ma'am.

MS. HATHAWAY: Thank you.

That will be all, Your Honor.

MS. STILLER: I have just a few questions.

BY MS. STILLER:

Q. With regard to the June 22 Department of Health survey, Mr. Lewis, did the Department of Health surveyors tell you this is a licensure survey?

A. I believe they did. I have it in my notes.

(25) Q. You had an exit interview at the conclusion of the survey. How long did it last?

A. It lasted approximately an hour.

Q. Did the surveyors cite deficiencies to you?

A. They listed recommendations. They could be called deficiencies.

Q. Did they tell you, for example, they were concerned about a patient who was found with no clothing at 10:45 a.m.

A. No, ma'am. That is what she said on the survey of March 8, 9, 1977, not the June survey.

Q. Did they cite problems of documentation of medical records?

A. Yes, I believe they did.

Q. Did they cite some deficiencies in the nursing care plans?

A. I don't recall, ma'am.

Q. Did they talk about some problems in delivery of pharmaceutical services?

A. I really would have to say I can't recall, not at that time.

Q. Was the June survey subsequent to the hiring of the consultants you referred to before?

A. Yes. It was after that, yes.

Q. You stated that you hadn't gotten a written report of that survey from the Health Department. How much time does it usually take for you to get a written report of the survey from the Department?

MR. POSNER: Objection, sir.

(26) THE COURT: Objection overruled. You may complete the question, and then we will hear the answer.

BY MS. STILLER:

Q. How much time does it normally take you to get a report from the survey from the Health Department?

A. To give you an idea, from the last survey, the one done in November, we got a report in February for it. And the one that was done in March we got a report—we received this approximately 10 days before the date of my reply, which would have been the first couple days of April.

Q. At the exit interview did the surveyors indicate to you what sort of recommendation they would be making to Harrisburg of your licensure status?

A. No, they did not.

MS. STILLER: I have no further questions.

THE COURT: Anything further?

MR. POSNER: Just one question, sir.

Redirect Examination

BY MR. POSNER:

Q. Have you received from the various persons that you refer to as experts written reports concerning the results of their surveys and their recommendations?

A. I—

Q. Referring to Professor Bund and Mr. Cumiskey and Mr. Jones and Dr. Finkelstein.

(27) A. I have not received those reports personally. Other people within Geriatric and Medical Center have, and they asked me to take action on things that were quoted in there.

MR. POSNER: Thank you, sir.

You may leave the stand unless His Honor has questions.

(The witness was excused.)

MR. POSNER: Mr. Bund.

TOBIAS BUND, sworn.

Direct Examination

BY MR. POSNER:

Q. It is Professor Bund, is it, sir?

A. Yes, sir.

Q. And what background do you have, sir, to the term "professor"?

A. I serve as professor of health care administration, French and Polyclinic Medical School in New

York City, I am a member of the faculty of the Rutgers University, New Jersey, and its Health Care Advisory Committee, a member of the faculty of the Connecticut School of Business Management and Continuing Education, member of the faculty of C.W. Post College and Medical Institute of Health.

Q. Professor, at our request, were you part of a peer review of Town Court Nursing Home?

(28) A. Yes, sir.

Q. Would you be good enough to tell His Honor —when I use the term "peer review," your interpretation of that?

A. I was requested by Geriatric Center to make an evaluation of the Town Court for the Center on Lombard Street at the latter part of May, and I visited the facility and stayed there from June 4 to June 7.

The purpose of the survey visit was to evaluate the services being rendered at the facility, the operation of its various departments, and the overall status of the patient care and that which was being rendered by the administration of that particular facility.

In this sense we consider that a peer review with regard to the survey made by the Department of Health to the State.

Q. I am not going forward, sir.

I would like to refer to specifics rather than generalities, and I am asking you what you found and what you recommended. Will you refer to specifics rather than use general terminology.

With that warning, May I say, sir, would you tell His Honor what type of examination you made, what

you did, what you found and what you recommended?

A. I surveyed the entire facility. First of all, from the viewpoint of the requirements of the Life Safety Code and found they met the standards of that particular Code.

(29) I then surveyed the facilities from the viewpoint of operations of each and every one of the departments, which meant a complete review of all the personnel folders to see that they comply with the federal and state standards as they existed at that time.

I surveyed the various operations of the departments, whether they were in operation, and I observed the nurses function in the administration of medications.

I checked the patients' charts; I checked the pharmacy labels in conjunction with the physicians' orders; I checked the service of foods, the menus, the comparison of the service of the menus and the use of the facilities in general.

I studied and made observations of the rehabilitative services of that department and found they were functioning in accordance with the orders prescribed by the attending physician. I reviewed the policies of the facility, in general the manual of the facility.

We recommended some areas to be reviewed and rewritten in order to meet the current standards of the HEW and the State Health Department of the States; and those recommendations were sent to the facility, that is, to the operators of Town Court.

I also reviewed all of the survey reports for the March 8 survey through the 11th; and by the time I

got there on June 4, 5, 6, 7, I would say that 99 percent of the items listed had been corrected.

(30) Q. Now, sir, would you be good enough to describe to His Honor the inner workings of Town Court. By that I mean the various departments, how they work, therapy, speech, whatever it may be, and the type of care you observed and whether or not you made any constructive criticism concerning that or recommendations.

A. Well, there are a number of departments, Your Honor, in each nursing home. Departments are more or less mandated by the regulations and the statutes involved. Each department functions in accordance with the administrative policies established, and most of those policies are more or less dictated and mandated by the federal and state regulations.

For example, let us that the Dietary Department. The Dietary Department functions in accordance with orders prescribed by the attendant physician for the particular patients. Those patients who require various types of diets, what have you, based upon the calorie intake, the Dietary Department in consultation with dieticians prepares the menus. The menus were prepared on a weekly cycle and several weeks prepared in advance.

The Dietary Department prepares the food in accordance with normal procedures, and the foods are delivered with the patients' identification cards so that the patients will know and the nurses on duty will know that the patients are being given the food that they require.

Similarly, the pharmaceutical supplies to the facility are all supplied on the basis of the attending

physicians' orders (31) for the particular patients. The pharmaceuticals themselves are kept in individual bins for the benefit of each patient. Nurses check the orders prior to administering of the medications, and this one facility I was very pleased to see that the nurses even went so far as to check the identification bracelets of the patients before administering it. This very often doesn't happen in most facilities, but that was an unusual event insofar as this one was particular concerned.

Each similar department was checked, Your Honor, in the sense we checked with the Maintenance Department. We spoke to the director of nurses. We observed these procedures. We discussed the food, for example, with all of the patients. The vast majority of the patients were more or less happy about the kind of food. Those who requested additional food were able to obtain it once the nurse approved it from the Dietary Department, and generally the facility itself was properly maintained on a housekeeping basis as well.

Q. Professor, did you reduce your findings to a report that you gave to management?

A. Yes, sir.

(An 11-page report by Professor Tobias Bund entitled "Analysis of Statement of Deficiencies Resulting from Survey Conducted March 8-11, 1977," was marked Plaintiffs' Exhibit No. 5 for identification.)

BY MR. POSNER:

(32) Q. I show you, sir, what has been marked Plaintiffs' Exhibit 5 and ask you is that not a copy of the written report filed by you (handing)?

A. Yes, it is.

Q. Just one other question, sir.

In your opinion, observing the operation of this home as you did from June 4 to June 7, is there any danger to the health and safety of the patients or residents who are confined there?

A. No, sir.

MR. POSNER: Cross-examine.

Cross-Examination

BY MS. HATHAWAY:

Q. Professor Bund, you say that you visited the facility June 4 through 7 of this year?

A. Yes, sir.

Q. Have you any knowledge of the conditions of the facility on or about the first week of March 1977?

A. No, ma'am.

(Pause.)

THE COURT: Anyone else?

MS. ANGELL: No, Your Honor, no questions.

THE COURT: All right, you may step down.

MR. POSNER: Thank you, Professor.

(Witness excused.)

MR. POSNER: Mr. Jones.

(33) ———

WILLIAM J. JONES, sworn.

Direct Examination

BY MR. POSNER:

Q. With what institution are you presently associated, Mr. Jones?

A. Presently I am the Director of the Department of Health and Social Services of the County of Hudson in New Jersey. I am also the Superintendent of Meadowview Hospital in Hudson County.

Q. On any prior occasion did you occupy any position either for the State of New Jersey or for the Federal Government in the State of New Jersey?

A. Yes, I did, sir. From 1969 through January of 1975 I was the Director of the Division of Medical Assistance and Health Services, Medicaid.

Q. For the State of New Jersey?

A. For the State of New Jersey.

Q. Do you have any connection, sir, with either Town Court Nursing Home or Geriatric Medical Center?

A. No, sir.

Q. At the request of Geriatic Medical Center, did you conduct a peer review of Town Court Nursing Home?

A. Yes, I did, sir.

Q. Now, sir, you were accompanied by whom on those occasions, other persons present?

(34) A. Mr. Jesse Gaynor, a pharmaceutical specialist; and I visited on June 13, 1977.

Q. Now, sir, as a result of your visit, did you file a report which you termed an evaluation of the Town Court Nursing Center?

A. Yes, I did.

Q. Would you be good enough, sir, to tell His Honor whether or not you found, and specifically, compliance with the federal and state regulations and the general physical aspects of the place and any recommendations that you made as to those conditions?

MS. ANGELL: Your Honor, may I object to the form of the question? It calls for a conclusion of law as to whether or not it is in compliance with federal and state regulations.

THE COURT: The objection is overruled. I will interpret it accordingly.

Go head.

THE WITNESS: Thank you, Your Honor.

First of all, I have never heard of Town Court before. When I was asked to do an evaluation, it was explained to me that they did have some difficulty with regulations and certification.

My first task was to take a look at the March 8 to 11 report that listed deficiencies, and I must confess to some confusion because in my opinion the deficiencies listed were not deficiencies in accordance with regulations.

For example, one deficiency listed in the Home's agreement—intermediate care facility—had lapsed. To my (35) knowledge there is no regulation requiring an agreement with ICF. This is with a general hospital. I didn't consider that a deficiency.

I visited the physical plant, the floors, the various rooms. I interviewed patients or any

relatives or visitors who were with the patients. I tried to obtain the attitude of patients and family and friends towards the Home and to get a history of the care of the Home.

I reviewed the administrative processes; and I have reviewed, as I said before, the compliance with the standards. In my opinion the physical plant is clean, is well kept. There are minimal maintenance problems involved.

Patient care in my opinion, once again, is very, very adequate. I noticed that one of the deficiencies had to do with patients with decubiti, and the deficiency stated with a decubiti was sitting in urine.

And I noted with interest that there are no patients with decubiti in the facility now. Clearing of decubiti or decutitis is evidence of good patient care, nursing care; and I questioned whether or not the patient, as insinuated in the reports, was receiving such poor care how could the decubiti be cured or healed I should say.

THE COURT: You don't know if the patient was still there?

THE WITNESS: Yes, I did, sir; and I specifically (36) requested the patient who was referred to in the room—we tracked that down. And I also interviewed other patients, families, who had been admitted to the Home with decubitis and decubitis was healed in the Home, sir.

THE COURT: Thank you.

THE WITNESS: Generally speaking, if I may, counselor, there were some other areas of reference.

BY MR. POSNER:

Q. Would you, sir, go into that.

A. Particularly with pushing a patient. I presume they meant in wheelchair—while pulling another patient. In rehabilitation we know and we teach that wheelchairs are a specialty item and must be prescribed.

One of the things I noticed, which is not peculiar to this facility, it is peculiar with most facilities, is that they do not have prescribed wheelchairs. Therefore, when you have no footrest and you are trying to transport two patients on many occasions one patients is pulled backwards. This is done not only in the institute of Physical Medicine and Rehabilitation in New York and the Chester Institute in West Orange, New Jersey, to some degree, but you will find it in many, many, if not all, nursing homes where patients do not receive the appropriate wheelchairs and it results in the observation of patients being pulled.

Other observations that were made, the showering of a patient in front of the inspectors. I really couldn't address (37) myself to that because in reviewing the showers it would seem to me the inspectors would have to enter upon the patient being showered. I really couldn't criticize the Home nor staff for inspectors being in the shower room when the inspectors would enter the room.

The other observations about the patients being showered and having the bathrobes put on back-

wards, in most institutions after showering a patient and transporting the patient they do put bathrobes on backwards until the patient is transported back to the room where they are dried and properly clothed.

So some of the observations made in my opinion, sir, were observations that could be made in any facility. And I must say I am quite amazed because the federal bible for surveyors does point out that if there are non-compliance issues then there must be a supportive document showing how the particular item that is being observed threatens the health and safety of patients, and I have seen no document except the March records. I do see no statements or narrative where the health or safety of patients has been threatened at this institution.

Q. Sir, did you document by way of a report the evaluation you made at that time?

A. Yes, sir, I submitted a report.

Q. Did you submit a report to any of the authorities aside from submitting it to management?

A. No, sir.

(A 22-page report by William J. Jones entitled (38) "An Evaluation of the Town Court Nursing Center, June 1977," was marked Plaintiffs' Exhibit 6 for identification.)

BY MR. POSNER:

Q. I show you, sir, what has been identified here as Plaintiffs' Exhibit 6 and ask you whether that is a copy, if not the original, of the evaluation you made of Town Court Nursing Home.

A. It is, sir.

Q. Now, sir, one general question that I must ask of you in your opinion as an expert. Do you

see any danger to the health and safety of the patients that are confined or are residents of Town Court Nursing Home?

A. I do not, sir.

MR. POSNER: Cross-examine.

Cross-Examination

BY MS. HATHAWAY:

Q. Mr. Jones, when did you say you were in the nursing home, in Town Court Nursing Home?

A. June 13.

Q. June 13.

Have you any knowledge about the conditions in Town Court Nursing Home in March of 1977?

A. Only from the statement of deficiencies and plan of correction dated March 8.

BY MS. ANGELL:

Q. Mr. Jones, how long were you at the facility in June?

(39) A. I was there all day from about quarter to 9 until almost 6 o'clock with the exception of 20 minutes for lunch.

Q. All right. That was the only day you were there?

A. That is correct.

Q. You had no prior contacts with Town Court?

A. That is correct.

Q. Had you had any contact with the facilities run by the corporation in New Jersey?

A. Not to my knowledge except when I was Director of the Medicaid program in New Jersey. If they had any facilities in New Jersey, they obviously

would have been associated with me as a director; but I did not know of the organization.

Q. I see.

Now, in these June 13, 1977, visits you said you spoke to patients. Approximately how many patients did you speak to, if you can recall?

A. Some 25, 26.

Q. Patients?

A. Patients.

Q. You indicated you also spoke to families. Approximately how many of those?

A. Approximately nine.

Q. And you had interviews with staff; is that correct?

A. Yes.

Q. Now, in your report here you made reference, for example, (40) to the pushing and the pulling on Page 13; and, for example, your comment is, "I presume this relates to," so that you have no actual knowledge either of the incidents or what it meant?

A. The incident—the statement of deficiencies is not specific. I presume they may be wheelchairs. I didn't assume they were physically pushing patients down the hall.

Q. But all of these are based on your reading as to what the deficiencies are?

A. That is correct.

Q. You indicated you made a series of recommendations.

Are these listed in your report?

A. Yes. I must point out there is one recommendation where I recommended they hire a consulting siatrist, and I see it came out in the type as

psychiatrist. That is a psiatrist, which is a physical, medical and rehabilitation person.

THE COURT: Is there such a word?

THE WITNESS: There is such a word. It confuses even typists.

BY MS. ANGELL:

Q. Are these recommendations made on a specific report or throughout the report?

A. Throughout the report.

Q. To your knowledge have they been satisfied, have the recommendations been met?

A. Well, I have not been back to the Home to check whether (41) the recommendations have been corrected or not. I would presume that the authorities in the Home would make the correction.

Q. But you have no direct knowledge?

A. I have no direct knowledge, no.

MS. ANGELL: Thank you.

MR. POSNER: Thank you.

THE COURT: You may step down.

Thank you, sir.

(Witness excused.)

MR. POSNER: Mr. Cuminskey.

JOHN E. CUMINSKY, sworn.

Direct Examination

BY MR. POSNER:

Q. Mr. Cuminsky, what is your present position?

A. At present I am a retired—semi-retired nursing home owner.

Q. And you are the owner of a nursing home where, sir?

A. I was the owner of a nursing home for 27 years in the State of New Jersey.

Q. You own it today, sir?

A. No, I do not. I sold it three years ago.

Q. What are your qualifications concerning the administration of being a nursing home administrator or an expert in the field of (42) nursing home care?

A. I am a licensed nursing home administrator in the State of New Jersey. I am a registered nurse in New Jersey and New York State, and I am a licensed biochemist and laboratory director of the State of New Jersey.

Q. Have you on prior occasions been involved in what we term peer reviews, sir?

A. Not specifically as such, but I have consulted over the years with many nursing home owners.

Q. Now, sir, in that capacity were you requested to make a review of Town Court Nursing Home in Philadelphia?

A. Yes. Yes, sir, I was.

Q. When did you visit the place, sir?

A. June 14 and 15.

Q. In what year?

A. 1977.

Q. Now, sir, were you alone on this occasion or were you accompanied by any other expert?

A. I was entirely alone.

Q. Will you tell His Honor specifically as possible what you were looking for, what you found, what you recommended.

A. The officials of Town Court Nursing Center had sent me a copy of the statement of deficiencies and plan of correction insofar as they related to nursing care, nursing problems, medical records, governing body and management, patient activities, nursing (43) services, medical records I think I mentioned already, and physical environment.

The reason I believe they sent these to me was because I found on the report that many of the deficiencies were overlapping from the heading area such as government body and management overlap into the nursing care. So, therefore, I have addressed myself to these as well.

Q. Did you do so, sir?

A. I did.

Q. Will you tell His Honor the result of your investigation and/or recommendations thereafter?

A. Well, when I went there I took—the first thing I did I walked through the entire institution and my first impression was very favorable. I didn't think I would be there as long as I was. Of course, I underestimated the time required to do this type of study.

So I was very favorably impressed, and then I started to go into specifics. So I was there a total of 17½ hours, except for a half an hour each day for lunch.

When I had lunch, I went at 2 o'clock in the afternoon rather than at noontime because I felt it very important to observe the methods of feeding and serving the patients.

I was also there during the hours when the patients were receiving their A.M. and P.M. care, bathing,

robing, dressing, undressing, etc., because these are the times in a nursing home (44) when you can really see if anything is being done. If you visit a nursing home at 2 o'clock or 1:30 in the afternoon a lot of things can be swept under the rug as far as patient care is concerned. You have to be there when I was to realize what was being done.

I have outlined under the same manner and under the same prefixes and tags as the State uses in their inspections or reviews, surveys, excuse me. Well, I reviewed the corporate records insofar as registered nurses were concerned. I went to the administrators, and I found everything in order. Their personnel policies, employee records, health certification, employment applications were all up-to-date and in order.

They also had work assignments for all of their personnel. They have written policies and procedures giving notice to the patients so far as responsible parties are concerned, the patients' status, parties' billing, and etc. They showed this to me, and I felt it was very satisfactory.

Under governing body and management there are many areas that run over so far as the survey is concerned by the State—run over into the area of nursing care.

For example, restraints, well, I have learned 24 patients at Town Manner; and there was a current physical border for every one of them.

THE COURT: How about Town Court? Did you see any there?

THE WITNESS: I beg your pardon?

(45) THE COURT: How about in Town Court? Did you see any there?

THE WITNESS: Yes, yes, Your Honor. That is where I was.

BY MR. POSNER:

Q. You inadvertently said Town Manner.

A. Excuse me, Town Court, Town Court, excuse me.

Well, I found them to be of the normal type of restraints that you find in a nursing home, known as Posey restraints. They are the protective type. These prevent the patient from scratching, bruising himself, or pulling out catheters or things of that nature.

I didn't observe any maltreatment or anybody being pulled backward. I saw a lot of transporting of patients from the rooms to lounges, to telephones, to the lavoratories, tub rooms and showers, and to the activity room on the main floor, and physiotherapy. It is a very busy place. A hundred eighty-six patients and nobody is restrained. All of the patients have access to all of the areas except those areas where they shouldn't, except the nurses' areas and medication areas. They are free to go back and forth where they choose, which in my opinion shows very good nursing care. They are not restrained in any way from that.

I checked the patients, the male patients as far as shaving is concerned, and grooming, and I didn't see any man who (46) needed a shave. I did notice one woman that had an excessive growth of hair on

her face, and I suggested to the RN and she consulted with a doctor as to whether to use depilatory cream or to shave the woman, and I surveyed the in-service training in this area and found it very strong on patient grooming.

There is another area where the patients have been observed with food particles lodged in their teeth and mouths. I examined about 40 patients. I used a tongue blade, a different one each time, and I didn't see anybody with food particles in their mouth.

I discussed this area with the director of operations; and I made some recommendations in this area, in the future. I feel if they are carried out, you know, this problem wouldn't come up at all; but I didn't find it.

I found the policy now established where every patient is to have a dental exam on admission by a licensed dentist and yearly thereafter. This does not call—again, it is not called for in regulations. But Town Court notified me and showed me the procedure, the policy, that they wished to do this in order to be 100 percent in this area; but this is not called for as a matter of regulation.

Mr. Jones refered he didn't see any decubiti in the facility, and I have to take issue with that, although I understand Mr. Jones checked those patients previously that had the decubiti and found they were healed. In my visit I found seven (47) decubiti. However, for 186 patients I consider this very, very remarkable. This is a very, very low incidence of decubiti; and I also found most of the decubiti the patients had them prior to their admission to Town Court.

There was also a note in this area from the surveyors that they found the patient lying in urine and there were no dressings on the patient, there was no dressing on the patient's decubiti. I checked this out, and I looked at the patient's chart. There is a procedure for treatment of decubiti that has been developed by the medical director, and in most instances he prescribes that no dressings be used on decubiti.

Now, this is a matter of his preference since he is a medical doctor; and I found patients in many instances did not have dressings on their decubiti. However, everything we checked out on the doctors' orders, and the records were all entered on treatment on the doctors' and nurses' notes on these seven decubiti.

I checked 47 Town Court patients at various times in two days. I found four lying or sitting in urine. I found this is considerably remarkable.

THE COURT: Remarkably good or bad?

THE WITNESS: Remarkably good. Two of these patients were in the process of being changed, in my opinion, and the other two patients voided just very recently.

There was a note by the civilians that no procedures for cleaning combs and brushes. I reviewed it, and it is very (48) adequate.

There was also a note that the sign-in sheets to the 11 to 7 tour of duty were not available. When I was there, they were available and reflected the necessary duties to be performed.

I reviewed a total of 52 charts selected at random by myself in all pertinent and required areas. My review substantiated that all charts showed activities, evaluations, follow-up were pertinent to the patients' needs. All the charts showed evaluation and counseling by the consulting dietician.

I reviewed 35 charts for physicians' immediate and long-term goals. They were all complete and timely.

I reviewed 52 nursing care plans and found them up-to-date. They outlined specific and complete plan of care as well as short-term goals.

My overall observation showed that the patients were receiving very, very good nursing care. I went up and down those stairs—I was there 17½ hours—I went up and down the stairs many, many times. There are two elevators, and I couldn't wait for that. No one knew what my mission was. I didn't want them to know. I said, "Come help me do this and help me do that," and they didn't know why and they did help me.

One of the criticisms was many of the patients were in poor body position or alignment. Well, the type of patient that you encounter in a skilled home in a general way I could (49) classify them they have diseases that are cardiovascular, nutritional, cancerous, arthritic, neurogenic, genital-urinary, or gastrointestional. This isn't a complete list. However, it should denote some of the immense difficulties encountered to

give rehabilitative treatment and restore those persons of those illnesses. This is another criticism of the state surveyors.

However, they have a very strong program. I also reviewed the physical therapy area, and they are making strong efforts in these areas. But these are areas where people have diseases that are largely degenerative in nature and to rehabilitate this type of case is very difficult. However, they are endeavoring, and endeavoring very hard, to do this.

I didn't see anybody in poor body position and alignment; but to mention a few patients that could go in poor body position and alignment in a matter of seconds, I mention to you the following diagnoses: Hemiplegics, paraplegics, quadraplegics, spastics, multiple sclerosis, amyotrophic sclerosis, muscular dystrophy, arteriosclerosis and so on ad infinitum.

I believe it takes a great and constant effort to try to keep these patients in good position and comfortable and free of pressure points that would cause those sores.

I checked this out very carefully, and I believe that they are fighting this and winning it at Town Court. This is my observation.

There was a critique of procedures for bowel and (50) bladder training. I discovered that this was in effect at the time of the inspection. However, they have reinforced this; and the records of this are kept by way of a card post

above the patients' beds. And all patients on this type of training have this card above their beds, and I also checked their charts. And this is documented on their charts. I checked the in-service program in all of these areas and the in-service is being reinforced and is reinforced in this area.

There is a critique as far as range of motion is concerned, patients and amputees. I discovered on the charts this is being carried out on the respective patients for whom it is called for.

While I was there, I observed five meals and checked many charts; and I believe that everyone in Town Court, Nursing Home personnel especially, are very much aware of the patients' nutritional needs. My observation was about 25 percent of the patients had to be spoon-fed, which in a sense out of 186 is quite a prodigious job. I watched the nurses and aides doing this and thought they were very kind and gentle, and I noticed many of these patients had orders for spoon-fed and carried out.

I checked out diabetic diets, salt diets, and low residue diets and so forth. I found out that they were being carried out and there were records of this being kept in the kitchen as well as on the patients' chart and in the nursing care plans.

(51) There was a critique in the area of intake and output records. Now, I checked those

charts where it was called for on particular patients, and they had this information on that. I checked out with the director of nurses about one patient mentioned in the survey report where the patient was required to have eight ounces of water at every meal, I believe, and also they didn't have the intake and output record current. Well, I was shown a letter whereby the doctor had cancelled that order quite a while previously and inadvertently the nurse in transcribing the orders for the current month carried the order forward, but it was no longer in force and it was not necessary.

I might mention at this time the only way to get the doctors—not being critical of doctors, busy men—the only way you can get the doctors to rewrite is for the nurse to rewrite the orders and the doctor to come along and initial them. This is a device all the states used, a device, if you want to call it that, in order to meet this regulation. There is no way in God's world to have doctors comply with it voluntarily and sit down and write all those orders. They simply won't do it. They simply laugh at you and walk out of the door. This is a means taken to do this and done all over the country and acceptable.

However, a nurse transcribing this many orders it is certainly not too difficult to make one little mistake. However, in other areas you can check on these mistakes and they are picked up at any rate.

(52) I didn't see any breakfast trays in evidence at 11:30. This doesn't surprise me because I haven't been in any nursing homes I ever saw the breakfast tray on the floor at 11:30 a.m. I went to the kitchen. There were no breakfast trays there because it was almost time for dinner, for lunch.

I didn't see any medications being given by anyone but RNs and LPNs. I checked some medications that were outlined in the inspection report, and I checked out all the medication charts. I found these charts all patient floors, and I checked them for proper labels, storage, and administration. I also checked the emergency medication tray for proper content.

While I was there a three-way check—that is a check of the patient order, drug proper handling, and to the patient's chart—this was being carried out and carried out in an efficient manner.

I checked 52 charts and found out medication and treatments were as ordered by the physician.

There was another critique that said there were pre-poured medications. I did not observe anything of that nature while I was there. That was not being done.

There were several verbal orders on the survey report by the State. They were not countersigned by the physician within 48 hours. When I was there, there were no orders that were not

countersigned within 48 hours. However, I note, and I must stress this in this area, you have to have cooperation of the (53) physician as well. I know they do try to cooperate. Sometimes they just don't show up at the proper time. You just have to sweat it out or call them up and try to get them there; and I have been through this myself, too.

On the review the surveyors found some medications on the patients' bedside. These were not very dangerous medications. They were things like for hemorrhoids.

THE COURT: I can read the report. Don't worry about it.

THE WITNESS: However, this much should not be in any case; and I made a recommendation in this area that this never happen again. And I showed them ways to reinforce this so it would not happen.

I reviewed the patient activities program, and I found it to be very busy and diversified. I consulted with the full-time director, and she has a college degree in this area. They carried out their patient activities in three different physical areas: in a large recreation room on the main floor; in activity rooms, one on each of four patient floors, and at the patients' bedside. General programs offered are religious services, arts and crafts, bingo, games, birthday parties, holiday observances, newspaper and public events meetings, appearances by musical

groups, play and dancing groups and residential council meetings.

The residential council is a group of people selected (54) by the institution to have some say in what they wish done in the institution, and I think this is not required by the statute or by regulation. But I think it shows a very progressive attitude on the part of the management.

However, there were some people there that didn't participate in anything. In some cases this is because of their physical and mental condition. There are others who won't participate in anything no matter what you do. There isn't many. The people were kept pretty busy, and I was there a long time each day.

I reviewed medical records, and I reviewed 52 patient charts. And I found it complete. The files of physicians and nurses were up-to-date and adequate.

Discharge planning, I reviewed the charts for this; but I consider this to be very hazy at best, in any institution. This represents medical opinion, and it is often questionable in case of illness. It is very difficult for a physician to give me an opinion in this area.

To look at me, there is no way I can tell you what I think is going to happen or I can promise you this man and woman "to just pick up your crutches and walk out the door." They just can't do that.

All the patient care plans I evaluated reflected good plans of care, gave the patient status and the goals to be strived for.

All patient consent forms were signed by the patient (55) or guardian. All nursing summaries on all three shifts were complete on all 52 charts surveyed.

I reviewed 15 charts in the area of diagnosis, therapeutics, progress notes, etc. I found them to be adequate and informational. Here, again, each physician is different in the way he believes this should be done.

There was a critique about closed medical records. I didn't have time to look at any of those, but the operations officer and the director of nurses with whom I had constant contact during my time in Town Court have told me they were now in good order.

I also looked at the physical plant because you naturally look at it as you go through; and I found it to be very, very clean and housekeeping was very, very good. The floors were exceptionally clean and shining. All areas were well dusted and ventilated. All lavatories were clean and neat. I could detect no disagreeable odors in any area.

There was a critique—and here this is called for in the regulations—that there were no electronic call buttons in three patient activity areas; that is, patient lounges. These areas were immediately adjacent to the respective nurses' stations. When I was there, I observed the tap

bells, which you tap and they ring, were installed. Now, since these are so close to the nurses' station, I am sure they would be heard if patients wanted to summon anybody.

(56) In the hazardous areas, particularly those exit doors leading to elevators and stairways, tape, which has been sprayed with an abrasive type paint—

THE COURT: Abrasive?

THE WITNESS: Abrasive type.

There was a critique in the survey report which referred to no warning devices for blind persons being in the institution. At the present time this is not to my knowledge a requirement. However, this abrasive—type paint was put on strips of adhesive or some other type of tape—I don't know what it was—and in the areas where a patient would touch them or a patient would touch them these were placed on the exit doors leading to the elevators or stairways or other areas which a blind person might stumble into.

They have also established a procedure in their in-service program to acquaint all the personnel with the necessity of indoctrinating patients now and in the future in this area.

As I mentioned, the participation at present do not call for audible or visual warning systems. Also, it is my understanding that Town Court has requested a waiver in this recommendation.

All the patient rooms are equipped with audio-visual call systems.

There was a critique that the bed patients couldn't reach the call button, persons in chairs could not reach it. Well (57) I found the call buttons were within their reach. Both the bed patients and the chair patients it was within their reach.

I didn't see any instance where the privacy—there was a reference the aides did not draw the privacy curtains at such times they were examining patients or preparing them. In two days in the facility I didn't see any instance which this happened.

I wasn't asked to look at the kitchen, but I was also a mess officer of a 900-bed station hospital at the end of World War II. So I am interested in kitchens. So I looked at the kitchen, and I know the requirements in this area, and I found the kitchen, the dishwashing area, and the storerooms to be immaculately clean and very well organized. All thermometers were in place, and all refrigerators and freezers were exceptionally clean. All foods were properly covered and stored. Their menus are good and the food was well prepared and attractively served. All kitchen rules, schedules, etc., were in order and conspicuously displayed.

I was intrigued by the physiotherapy department and housekeeping, which was good. I was impressed by the amount of activity in this department. I inquired and met the director of

the physiotherapy for Geriatric Medical Centers, and I was shown records that they treat an average of 65 patients and give 65 treatments five days a week. This is a very, very busy department and was very clean and well run.

THE COURT: You are talking about 65 each day?

(58) THE WITNESS: Yes, sir.

THE COURT: How much longer is your report?

THE WITNESS: That is it, Your Honor.

THE COURT: Recess for 10 minutes.

(Recessed from 3:40 until 3:55 o'clock p.m.)

THE COURT: Any cross-examination?

MR. POSNER: Well, sir, I haven't finished with the witness yet.

THE COURT: I am sorry, I thought you had.

BY MR. POSNER:

Q. You have testified here, sir, concerning various critiques—

THE COURT: Yes, he certainly did. We all heard it.

What is your question?

BY MR. POSNER:

Q. —and deficiencies alleged—

THE COURT: Please ask the question, Mr. Posner.

BY MR. POSNER:

Q. My question to you, Mr. Cuminsky, having reviewed those alleged deficiencies have you in your examination found that any of them exist there or have they all been corrected if they ever did exist there?

A. I didn't find any in existence at the time of my survey; and if they were present, in my opinion they have now been corrected.

Q. Now, sir, did you reduce to writing a report of your (59) investigation, your findings and your recommendations?

A. Yes, I did.

MR. POSNER: Mark this.

(A 17-page report by John E. Cuminsky dated June 28, 1977, was marked Plaintiffs' Exhibit No. 7 for identification.)

BY MR. POSNER:

Q. I show you, sir, what has been marked as Plaintiffs' Exhibit 7.

THE COURT: You mean all that stuff he has been telling from the witness stand he had it in a report?

P-7 will be received.

Anything else?

(Plaintiffs' Exhibit No. 7 received in evidence.)

MR. POSNER: One other question, sir.

BY MR. POSNER:

Q. In your opinion, having observed this nursing home in operation, is there any danger to the health and safety of the patients that are confined there?

A. No, sir, there isn't.

MR. POSNER: Cross-examine.

Cross-Examination

BY MS. HATHAWAY:

Q. Mr. Cuminsky, you testified you were in the facility June 14 and 15, 1977; is that correct?

A. That is correct.

(60) Q. Have you any knowledge what the conditions—any personal knowledge of the conditions—were of the facility in March of 1977?

A. Only what I have read in the report.

MS. HATHAWAY: Thank you.

BY MS. ANGELL:

Q. Mr. Cuminsky, have you returned to the facility since the dates you testified you have been there?

A. Yes, I did.

Q. And on what dates were you there?

A. I was there approximately—today is the 26th—I was there about the 15th of July. I happened to come to Philadelphia with my wife, and my wife is a registered nurse also. So she was interested in what I had done there. She saw my report. She said, "I would like to see the place." So I called up and I asked if I could come down and see it. They said, "Sure," and I took her through.

Q. You took a tour?

A. My wife is curious. She knows about the nursing home business.

Q. You didn't identify the nursing home you had control for over 27 years. What is the name?

A. Pine Acres Nursing Home, Madison, New Jersey.

Q. I think the corporation has three facilities in New Jersey. Are you familiar with the Mt. Laurel Convalescent Center?

(61) A. No, I am not.

Q. The Cooper River Convalescent Center?

A. No.

Q. The Burlington Woods Convelescent Center?

A. No, I am not.

Q. Did you in this report that you testified to now—which has been identified as P-7—did you make any recommendations as a result of your visit?

A. I did.

Q. Have you had the opportunity to determine whether those recommendations have been implemented or not?

A. Yes. On my visit I checked a few areas, and I found they had.

Q. How long were you at your second visit?

A. Oh, I was there about 45 minutes.

Q. During those 45 minutes you checked your recommendations?

A. Oh, not all of them. I just asked—I saw the director of nurses, the assistant, and I saw a few of the charge nurses. I said, "Did you charge such and such thing?" And they said, "Yes." I said, "How is it working?" They said, "Good."

Q. Could you identify any of those recommendations?

A. I beg your pardon?

Q. Could you identify any of those recommendations?

A. Well, I checked the area of dental care of the patients, and I made recommendations what to do.

(62) Q. What page is that one?

A. On page 4.

Q. So that in fact you determined that the policy is in the fact each patient is to have a dental exam?

A. Right.

Q. Anything else?

A. No, not really, because, as I say, I discussed some of these things with the RNs and the director of nurses. I didn't find anything substantially wrong when I was there.

Q. So in effect there are no recommendations?

A. Not many, no, just a few verbal things we discussed.

Q. I see.

How large was the institution you ran for 27 years?

A. I beg your pardon?

Q. What was the bed capacity?

A. 103 beds.

Q. And was it a skilled nursing facility?

A. Yes.

Q. Did it have medical assistance patients?

A. Yes.

Q. Approximately what proportion were medical assistance patients?

A. Approximately 25 percent.

MS. ANGELL: Thank you. No further questions.

MR. POSNER: Thank you very much, Mr. Cuminsky.

(63) (Witness excused.)

MR. POSNER: Dr. Linden.

MAURICE E. LINDEN, sworn.

Direct Examination

BY MR. POSNER:

Q. Doctor, you are a practicing physician in the City of Philadelphia?

A. Yes, I am.

Q. Do you have any specialty, sir?

A. I am a psychiatrist.

Q. And, sir, are you associated with any institutions in which you practice your expertise?

A. I am a clinical professor of psychiatry at Jefferson Medical College.

Q. Now, sir—

A. I am also—

Q. I am sorry.

A. —chief of geriatric psychiatric outpatient service for the Jefferson and Community Mental Health Center.

Q. Is there anything you wish to add as to your qualifications?

A. I am Board-certified.

Q. And have you been practicing your field for how many years?

A. About 32.

Q. Now sir, what is your contact with Town Court Nursing Home?

(64) A. Town Court is in our catchment area, the mental health area that Jefferson Medical College services. So that I am occasioned to have the privilege of them calling upon us for psychiatric assistance, which we rendered on quite a number of occasions.

Q. Have you personally rendered such service to them?

A. Yes, I have. I have also brought my social worker with me.

Q. And on these occasions do you receive any compensation or remuneration from Town Court Nursing Home?

A. None whatever. We try to be reimbursed—that is, the clinic—through medical assistance or Medicare. That is often quite difficult.

Q. Now, sir, you have observed many of the patients at the Town Court Nursing Home?

A. Oh, yes.

Q. Would you care to give us an estimate of how many you may have observed during the course of your visits there.

A. In the past three years the total number of people that I have seen there at the Home I suppose they would number in the 300, 200.

Q. Now, sir, assuming that these patients had to be removed within a short period of time such as 30 days or 60 days, would there be any effect on these patients from the mental point of view—forgetting

the physical aspects of it in your opinion—and, if so, will you give His Honor the reasons therefore.

A. Yes. My opinion in this instance is studied. It is (65) based on experience in the field of gerontology and geriatrics, the field I have been in since 1946.

There is copious evidence in the literature that the transfer of dependent elderly patients out of an institution of health care, nursing homes, for example, tends to be on a high mortality rate. Some get sicker and some die.

Q. In your opinion would the removal of any of these patients endanger their lives or aggravate their mental or health conditions?

A. On the basis of that finding, I think we could safely say yes.

Q. In your opinion is there any danger to the health and safety of the patients that are presently residents or patients at Town Court Nursing Home?

A. I have not found reason to believe that. I think there is no such danger to their health or safety at the present time.

MR. POSNER: Cross-examine.

THE WITNESS: Nor was there at any time I have visited it.

MR. POSNER: Cross-examine.

Cross-Examination

MS. HATHAWAY: I have nothing, Your Honor.

THE COURT: Any questions?

MS. ANGELL: Yes.

BY MS. ANGELL:

Q. Dr. Linden, had you read the material that was provided (66) on the Department of Health survey that was used by the Federal Government? Had you read the report?

A. The report made about this institution?

Q. Yes.

A. No, I have not.

Q. Have you seen any reports made by the Department of Public Health or their surveys made in reference to this institution?

A. No, I have not.

MS. ANGELL: No further questions.

MR. POSNER: Thank you very much, Doctor.

THE COURT: You may step down. Thank you, sir.

(The witness is excused.)

MR. POSNER: Mr. Gaynor.

JESSE GAYNOR, sworn.

Direct Examination

BY MR. POSNER:

Q. Mr. Gaynor, are you associated with Town Court Nursing Home?

A. No, sir.

Q. What field are you familiar?

A. I am a registered pharmacist, the State of New Jersey.

Q. And you are presently doing what, sir?

A. Presently Executive Vice-President of a company called (67) Automated Pharmaceutical Services. We specialize and provide pharmaceutical services to long-term care facilities. We currently service 26 facilities in New Jersey.

Q. Do you serve any of the geriatric institutions in New Jersey?

A. No, sir.

Q. Now, sir, what is your past history in the field of pharmacology?

A. Prior to joining A.P.S. in March of 1976, I was chief, pharmaceutical services, in a New Jersey Medicaid program.

Q. You were a state employee or director, sir?

A. Yes, state employee.

Q. Now, sir, at our request did you make a "peer review" of Town Court Nursing Home?

A. Yes.

Q. Would you be good enough, sir, to tell His Honor what you investigated, what you found, and what recommendations, if any, you made?

MS. ANGELL: Excuse me, Your Honor. If that is in the form of a report, could we have that?

THE COURT: Do you have a report?

THE WITNESS: Yes, I do. I submitted a report.

BY MR. POSNER:

Q. You submitted a report to whom, sir? Did you submit a report?

(68) A. Yes, I did. That is a copy of it (indicating).

Q. To whom did you submit the report?

A. That report was submitted to Mr. Jones.

Q. Mr. Jones had testified here prior?

A. Yes.

Q. I see.

A. There was a followup visit. This is the followup report that was made to Mr. Coyle.

Q. Who is Mr. Coyle, sir?

A. Mr. Coyle, as I understood it, is the attorney for the Town Court Nursing Home.

Q. You are not talking about the Mr. Coyle sitting at counsel table here?

A. No.

Q. Now, sir, do you have any copies of this?

A. You can have those.

MR. POSNER: Your Honor, I will have photostatic copies made of it. This is my first experience with these reports. I have not read them.

May I have it marked for identification at this time?

THE COURT: In other words, you didn't prepare for the hearing.

MR. POSNER: Pardon, sir?

THE COURT: Do I understand you haven't prepared for this hearing?

(69) MR. POSNER: Is that the conclusion that Your Honor reaches?

THE COURT: That is what thought you just said.

MR. POSNER: I said I have not read this report produced by the witness.

THE COURT: It occurred to me you might have talked to the witness before the hearing.

MR. POSNER: I did not.

THE COURT: All right.

MR. POSNER: Nor to any of the other witnesses that have testified.

THE COURT: Let's move along.

(A five-page report by Mr. Gaynor to Mr. Jones dated June 17, 1977, marked Plaintiffs' Exhibit No. 8 for identification.)

(A four-page report by Mr. Gaynor to Mr. Coyle dated July 19, 1977, marked Plaintiffs' Exhibit No. 9 for identification.)

BY MR. POSNER:

Q. I show you what has been identified here as Plaintiffs' Exhibits 8 and 9 and ask you if they are summaries of the inspection that you made of Town Court Nursing Home.

A. The first report dated June 17, 1977, is a report that I sent to Mr. Jones because he was the gentlemen that had contacted me and asked me to do this peer review.

(70) I visited Town Court Nursing Home on June 13, 1977. I reviewed the survey team's report on pharmaceutical services. I checked the specific alleged deficiencies and did a complete review of all of the nursing stations, the medication care, the patients' charts and records, the prescriptions in the medication carts. I checked the deficiencies to see if they were isolated incidents or a pattern. I found that they were not a pattern, that they were isolated cases.

I made specific recommendations both in writing and also verbally to Mr. Lewis, the administrator. When I returned on July 18, I found virtually all of the recommendations and suggestions had been carried out, even those recommendations not covered by regulation.

For example, I have a personal feeling that the provider pharmacist and the consultant pharmacist should not be the same, even though the regulations permit it. I made that verbal observation to Mr. Lewis, and when I returned on July 18, I found that they have hired an outside consultant to serve as consultant pharmacist.

I recommended that the policy and procedural manual be revised, that they have a separate pharmaceutical manual; and this is being done.

I specifically checked all of the patients—I rechecked all of the patients—on July 18, where I had found discrepancies in the first visit; and I found in each case the (71) deficiencies had been corrected.

On the July 18 inspection, I found everything in good shape.

Q. Now, sir, all of your findings and recommendations contained in the report that you have in your hand which have been marked Plaintiffs' Exhibits 8 and 9—

A. Yes.

Q. —in your opinion, sir, in your observations on the two visits you made there, is there any danger in your opinion to the health and safety of patients or resident patients?

A. No danger to the patient.

MR. POSNER: Cross-examine.

Cross-Examination

BY MS. HATHAWAY:

Q. Mr. Gaynor, you said you made two visits to the facility. Did you say June of 1977?

A. On June 13 and July 18.

Q. 1977.

Do you have any personal knowledge about the conditions that existed in Town Court in the first week of March 1977?

A. No.

MS. HATHAWAY: Thank you.

THE COURT: Any questions?

MS. ANGELL: I have no questions.

THE COURT: You may step down.

(72) Thank you, sir.

(Witness excused.)

THE COURT: Could somebody straighten out a problem in my mind, provide a solution to a problem which exists in my mind? Exhibit P-4, the letter from HEW, in the third paragraph it states:

"On May 8-11, 1977, the Pennsylvania Department of Health performed a"—

MS. HATHAWAY: Typographical.

THE COURT: Everybody agrees it is March 8?

MR. POSNER: Yes, Your Honor.

MR. COYLE: I would like to represent to the Court the attorney, Mr. Coyle, has been identified as counsel for Town Court is not related to me nor do I know the gentleman.

THE COURT: You don't know he is a gentleman actually.

MR. POSNER: I had intended to call Dr. Finkelstein. Unfortunately or fortunately, sir, he is out of the country. He is a urologic surgeon; and I have his report, his written report.

I would like to have it identified as Plaintiffs' Exhibit 10, and I trust there might not be any objection to it being submitted.

THE COURT: All you have to do is offer it and see if anybody objects.

(73) MR. POSNER: Thank you.

THE COURT: Any objection to P-10?

MR. POSNER: I will show it to you first.

(Pause.)

THE COURT: Urologic or neurologic?

MR. POSNER: Urologist, sir.

(Pause.)

MS. HATHAWAY: Your Honor, I would like to ask counsel for plaintiff for Town Court for a stipulation that Dr. Finkelstein had no personal knowledge of the conditions that existed there.

THE COURT: During the first week of March of 1977?

MS. HATHAWAW: Yes, Your Honor.

MR. POSNER: I really don't know.

THE COURT: Well, I will assume that he doesn't know.

MS. HATHAWAY: Thank you.

THE COURT: On that basis, we will receive the exhibit for whatever it is worth, P-10.

(A seven-page report by Dr. Finkelstein to Mr. John W. Francks, Executive Director, Geriatric and Medical Centers, Inc., dated July 12, 1977, marked Plaintiffs' Exhibit No. 10 for identification and received in evidence.)

MR. POSNER: Mr. Zelkovitz.

EDWARD J. ZELKOVITZ, sworn.

(74) *Direct Examination*

BY MR. POSNER:

Q. Mr. Zelkovitz, by whom are you employed and in what capacity?

A. Geriatric and Medical Centers, and I am the Vice-President.

My areas of responsibility are quality control and government liaison.

Q. And how many nursing homes are you in charge of?

A. Well, there are 10 as of this date.

Q. Now, will you explain to His Honor the type of supervision that you give to the homes.

A. Well, I am in touch with the administrators to review the enforcement, carrying out of the policy and procedure manual, and to assure that the quality of health delivery of the patients is in accord with the manual. In other words, that there is quality of patient care being delivered.

Q. Mr. Zelkovitz, you are aware of a notice received from both the Commonwealth of Pennsylvania and the Department of Health, Education & Welfare?

A. Yes, I am.

Q. And you are aware of that funding, according to that letter, will be discontinued as of July 18, 1977?

A. Yes, I am.

Q. Assuming that funding has been discontinued, sir, can you continue to fund Town Court without that federal and state [aid]?

(75) A. Well, the total capacity of Town Court is 198 patients. As of this date, there are 177 Medi-

caid recipients. Without a computer, I would say 90 percent. If we remove 90 percent of the income of Town Court, it would be impossible for it to function.

Q. So your answer is you cannot function without that aid?

A. Absolutely not.

Q. Now, have you taken all the steps or shall I use the word "reasonable" or may I use the words "to assure quality continued operation" at Town Court?

A. Absolutely.

Q. Assuming, sir, that you are compelled to close because of lack of funding, is there sufficient facilities in the area to house the people that would not be able to be taken care of at Town Court?

A. I am not sure I understand your question. You are stating if the 177 Medicaid recipients were removed from Town Court—

Q. Where could they go?

A. Well, they could go home to their families or they probably could go to hospitals. I don't think there are any skilled care beds available for them.

MR. POSNER: Cross-examine.

Cross-Examination

BY MS. ANGELL:

Q. Mr. Zelkovitz, you indicate you are financially responsible (76) for the 10 facilities?

A. I don't understand your question.

Q. Well, you indicated that you speculate that you will be unable to operate Town Court by reason of termination of the funding. Do you have—

A. If you let me—

THE COURT: Excuse me. Just wait for the question. Listen to it carefully.

THE WITNESS: I want to make sure I understand it.

THE COURT: Be quiet, please.
Go ahead.

BY MS. ANGELL:

Q. You indicated you believe you would be unable financially to operate that institution. Do you have responsibilities in the financial area for Town Court?

THE COURT: Is that part of your job?

THE WITNESS: No.

BY MS. ANGELL:

Q. I see.

You indicated that you took all the necessary steps to, I believe, protect or insure the good health of the institution.

What did you do?

A. Well, we have instituted many new programs. We were involved in a very progressive program which is the assessment care evaluation program in cooperation with Health, Education & Welfare.

(77) This is a very new approach to record-keeping for the care of patients. We were involved in this program for some time.

The Department of Health, Education and Welfare commended us on our progress. We assigned a nurse to this area. We have increased our nursing staff. We have four nursing stations, a second, a third, fourth, and fifth floor. We are required to have one professional nurse at each station. In addition to that, we are required to have a DON. We have two professional nurses now at each station. We have supervisors in addition to the DON around the clock.

From the standpoint of programs, we now have the Medical Direction Consultant Committee, which is comparable to a medical staff in a hospital, which is composed of several doctors; and we have ongoing programs. We meet regularly to improve the services.

It is quite a large facility—it is caring for 198 skilled care patients—and it is quite a task. We have installed sentry tubs on each of the floors so that in bathing the patients have this automatic piece of equipment which the patients sit in, rises and puts them into the tub, and also a very, very modern approach to nursing home care.

I am trying to think of some other programs. We are constantly meeting and discussing programs and methods for improving patient care.

(78) Q. Any of these changes exist in March of 1977?

A. Yes. I have been with Geriatric & Medical Center since February of 1975. I would say since that time we have been in an ongoing, upgrading procedure at Town Court. It is a long, tedious process. It is very difficult, all kinds of problems, but

we are constantly improving or we are moving ahead all the time, we are working very hard.

It has been a very costly program. It has been a very difficult program and achieving success. I am very proud of what happened there, even up to March of 1977.

Q. I see.

Now, you indicated there were no available beds to your knowledge. Are there available beds in your other nine facilities?

A. Well, you say nine. There is one facility that is just about ready to be licensed. We have to exclude that since it is not licensed.

In our licensed existing facilities, no, there are not a large number of vacancies, one or two.

Q. What is the total capacity of that to be licensed?

A. 140.

Q. So there are 140 new beds once licensing is to be completed?

A. Yes.

THE COURT: Where is that?

THE WITNESS: At 63rd and Walnut Streets.

(79) If I might, Your Honor, I might change one comment that the Pennsylvania State Relocation Committee has already committed a number of people to the new facility. So that there are thousand of applicants, literally there are thousands of people, waiting for beds to be built or constructed. And this information I get from the Adult Services Agency of Philadelphia, the City of Philadelphia, the Regional Comprehensive Health Planning Council, and the Department of Welfare. There are just thousands of people who are waiting for placement of skilled care facilities in Philadelphia.

There are many, many facilities in Philadelphia about to be closed because of life safety code problems.

MS. ANGELL: I have no further questions.

THE COURT: Anything else?
(No response.)

BY THE COURT:

Q. Did you ever see the statement of deficiencies and plan of correction (indicating)?

A. Yes, sir.

Q. When did it come to your attention?

A. Well, it came to my attention probably a day after it had been received by the facility.

THE COURT: No further questions.

Redirect Examination

BY MR. POSNER:

(80) Q. Did you make any attempts to correct the conditions as they were stated in the alleged deficiencies?

A. Oh, yes. We went over these at great length with Mr. Lewis and other members of the Executive Committee. We spent a great deal of time in correcting these. We are very careful.

We consulted with the Department of Health on many occasions as to how these can be solved and the proper way of answering the deficiencies. So we wanted to make sure we did everything properly.

MR. POSNER: Thank you very much, sir. That is all.

THE COURT: You may step down.

(Witness excused.)

MR. POSNER: That is my case, sir.

THE COURT: All right. Perhaps somebody else has a case.

Anything further from the other plaintiffs?

MR. COYLE: No, sir.

THE COURT: Anything from the defendants?

MS. ANGELL: Excuse me, Your Honor. May I have a second to speak with Mrs. Hathaway?

(Pause.)

MS. ANGELL: Your Honor, may counsel see you at side-bar a moment please, sir?

THE COURT: Why not. Do you want to meet in (81) chambers for a few minutes?

MS. ANGELL: O.K.

THE COURT: Suppose we recess into chambers.

(Conference in chambers off-the-record from 4:30 p.m. until 4:35 p.m.)

(The following took place in open court at 4:35 p.m.)

THE COURT: Proceed.

MS. HATHAWAY: Your Honor, I would like to call Gerald Szuc, the Director of the Division of Health Standards and Quality.

THE COURT: Fire away.

GERALD SZUC, sworn.

Direct Examination

BY MS. HATHAWAY:

Q. Mr. Szuc, would you give us your title, please?

A. My title is Regional Director for the Bureau of Health Standards and Quality. It has a regional office in Philadelphia.

Q. Can you describe for us how that relates to long-term care standards and enforcement?

A. Yes. Under a recent reorganization order by the Secretary of HEW, a number of health components dealing with the health provider certification program were pooled together.

(82) The Office of Long-Term Care Standards Enforcement was one of the component parts of HEW brought into a new organization called the Health Care Financing Administration.

The Bureau that I represent is a successor organization to the Office of Long-Term Care Standards Enforcement.

Q. And can you tell us who has certification authority in Region 3 for skilled nursing facilities?

MR. POSNER: I am sorry, I didn't hear the question.

THE COURT: She wants to know who had certification authority in this region.

THE WITNESS: That authority is vested in myself as regional director.

BY MS. HATHAWAY:

Q. Would you give us a short explanation of the relationship between your Bureau and your state survey agency with regard to certification of skilled nursing facilities?

A. Without going into a laborious explanation, it basically involves a contract between the Secretary of HEW—we are his agents—and the State of Pennsylvania, specifically with the Governor, which is delegated down to the Secretary of Health, and that goes down to another component within the Health Department that deals with surveys for Medicare certification purposes.

And it is a contractual arrangement. We fund the state agency to carry out surveys on a scheduled basis or on a special request basis, and we provide the funds to the State to (83) perform the various surveys.

That is it very briefly.

Q. Would you summarize the events leading up to the letter of May 17, of Town Court Nursing Home notifying them that their provider agreement would not be renewed?

A. All right. I don't want to bore the Court with all of the administrative—

THE COURT: Just answer the question, please.

THE WITNESS: We terminated it from the program; that is, I did not renew the provider agreement with the facility on October 31, 1974, on the basis of many standards not being met.

On December 2, 1975, a health survey was performed by the State agency and was not approved—their recommendation was not approved—for renewed participation in the program because of some significant deficiencies that continued to exit at the facility.

On April 14, 1976, the State agency—this is the State survey agency that I referred to earlier —again recommended a certification that this facility be participated in the Medicare program.

On May 11, 1976, the Department of Health, Education & Welfare notified that the agreement had been approved and that a cancellation clause would be made of July 31, 1976.

On July 19 and 20, 1976, the HEW regional office itself—

(84) THE COURT: Excuse me. What is that about July 31, 1976?

THE WITNESS: That was the date in which the provider agreement was to be cancelled pending correction of all of the deficiencies.

BY THE COURT:

Q. Notified them on May 11 that the agreement was approved by HEW?

A. Yes, I did, or we did, the office did.

Q. But it was going to be cancelled on July 31?

A. Pending correction of deficiencies noted during the survey.

Q. During what survey, the April 14 survey?

A. Yes.

Q. That undoubtedly makes sense to others, but it doesn't make any sense to me.

A. Should I continue?

Q. Whatever you want to do.

A. On July 19 and 20, HEW regional office performed a health care or health survey and found the facility out of compliance with the conditions.

On November 22 through 24, a request was made of the State survey agency to perform another survey to find if the facility was now in compliance, and the State agency finding indicated that it was out of compliance.

MR. POSNER: I will object to that and ask that be (85) stricken, sir.

THE COURT: Objection overruled. Motion denied.

THE WITNESS: On March 8 through 11, 1977—

THE COURT: Anything in between July 19 and 20 and March 8?

THE WITNESS: Not that I have in a quick review of the record.

MS. ANGELL: May we specify which State agency is performing these?

THE WITNESS: Yes. It would be the State survey agency, which is the Health Department.

MS. ANGELL: I see. Thank you.

THE WITNESS: On March 8 through 11, 1977, another survey was conducted by the State survey agency and again the conditions of participation were found out of compliance. At that point in time the State Health Department—

THE COURT: Excuse me.

BY THE COURT:

Q. Are you talking about this report here (indicating)?

A. Yes, I am, Your Honor. And at that point in time based on the survey that you have in hand the State agency recommended that the provider agreement not be renewed.

Q. Well, now just as a matter of curiosity, where does this say they are not in compliance with anything?

A. There is another form. It is a form letter actually (86) called the certification transmittal form, which bears the signature of a State representative, saying that it is not in conformance. I don't believe you have that in your hand.

Q. Certification and transmittal to whom?

A. It is just an official document called certification and transmittal, which the State sends to us and recommends a certain action. In this case they recommended that the provider agreement not be renewed.

Q. And they did that at the same time as the original survey or after they had the provider?

A. That would be the last stage, Your Honor, after the survey was conducted on March 8 through

11. Then the findings were written up and what is called the list of the deficiencies which you have in your hand. Then that whole package is then transmitted to us with a recommendation for non-continuance of the provider agreement.

Q. Notwithstanding the fact the provider was supposed to provide a plan of correction and hadn't done that yet because he hasn't had a chance; is that right?

A. The provider is given an opportunity—I have to look at the date of the certification and transmittal form, which I don't have in front of me. That would indicate when the form was submitted to the regional office.

But as a matter of procedure the facility is given 10 days to respond to the list of deficiencies, which would (87) be placed on the form that you have in your hand, sir, and they were given the opportunity to come up with a plan of correction except they did not.

Q. Well, what good would it do to come up with a plan of correction if you already had a recommendation to terminate?

A. They were given an opportunity to come up with compliance; they did not.

THE COURT: Let's find out.

Do we have a date on the transmittal?

(A one-page document concerning Town Court Nursing Center entitled "Medicare/Medicaid Certification and Transmittal" was marked Defendants' Exhibit No. 5 for identification.)

(A 68-page report concerning Town Court Nursing Center entitled "Medicare/Medicaid Skilled Nursing Facility Survey Report" was marked Defendants' Exhibit No. 6 for identification.)

MS. HATHAWAY: This is the certification and transmittal.

(Defendants' Exhibit No. 5 was handed to the Court by Ms. Hathaway.)

THE COURT: I will note I have been handed an exhibit called D-5, which purports to be the certification and transmittal of, presumably, the document referred to by the witness.

THE WITNESS: That is correct.

THE COURT: It bears a stamp showing receipt by (88) the licensing, scheduling and tracking unit, Division of Long-Term Care, Department of Health, of April 4, 1977.

I will note that the date on which the provider, after a plan of correction, was effective April 14, 1977.

MR. POSNER: I don't have a copy, sir. I assume I will be furnished with one at a later time.

THE COURT: You are not missing a thing.

MR. POSNER: Thank you, sir.

THE COURT: It doesn't say anything except recommend non-renewal of the agreement.

I will note it bears a typed date by the surveyor, who has been named, the date of March 11, 1977.

Proceed.

THE WITNESS: The conclusion simply is we did not review the provider agreement because it failed—the facility failed to maintain compliance with the conditions of participation for Medicare participation and that based on the history of the continuous non-compliance of the facility the decision was made not to renew the provider agreement at that point in time.

MS. HATHAWAY: Your Honor, this is Defendants' Exhibit 6. This is the survey report itself.

BY MS. HATHAWAY:

Q. Mr. Szuc, can you identify this for me, please?

A. The exhibit that I have in my hand is called "Medicare/Medicaid Skilled Nursing Facility Survey Report," and what it (89) contains is a listing of all of the standards that a nursing home is supposed to meet. It marks what conditions, what standards are or are not met at the time of survey, which at this time was March 8 through 11, 1977.

Q. Where are those standards derived from?

A. They are contained in federal regulation, and as a matter of fact, the wording contained in this form for the most part is an exact wording of the regulations themselves and—

THE COURT: Excuse me. This is absolutely meaningless. You have got them stapled together topsy-turvy. Some are upsidedown,

backside to, inside out. It is impossible to follow this exhibit.

I will note, for example, it is a sort of a check sheet and shows some things as the standards being met and others not being met.

THE WITNESS: Yes, Your Honor.

BY THE COURT:

Q. Do I understand if any one those standards was not met that would show non-compliance; is that right?

A. There is an evaluative process where all the standards—excuse me, please—there are three levels of items listed on here. If you look on the first page it says: "Compliance with federal, state and local laws." That is technically called a condition—

Q. That says: "Standard: Conformity with other federal, (90) state, and local laws." "Not met." It lists over on the right a whole bunch of things, including two patients' records reviewed and lacked yearly CBC and urinalysis reports.

If there was a state report that requires that, I would be amazed.

Another one, sprinkler inspection with a date. I don't know whether that should have been inspected more recently or wasn't inspected properly or what.

F. 14 the written agreement with the ICL facility has expired, and everybody seems to agree there is no requirement of law there be a written agreement.

I don't understand.

MS. STILLER: Your Honor, that is a misstatement by a witness. There is a requirement by state law.

BY THE COURT:

Q. What does "sanitation" mean?

A. What page is it, Your Honor, on?

Q. Still on the first one: "Standards: Conformity with other federal, state, and local laws," which is related to fire and safety, sanitation, communicable and reportable diseases, post-mortem procedures, and other relevant health and safety requirements, Page 2.

A. What is your question, I am sorry?

Q. My question is: What does it mean?

A. Conformity with other federal, state, and local laws.

(91) Q. When it says "sanitation, 12/3/76," what does that mean? Does that mean there is a law that says they have to be sanitated on December 3?

A. Your Honor, I do not know.

Q. I don't either.

What is "fire alarm inspection, 2/24/77"?

A. I am assuming that was—I am assuming this without knowing—that the fire alarm inspection was last performed on that date by a local inspector.

Q. In other words, there is no way of telling when she said—or when the inspector said—"Not met" over on the left you don't know in what respect they are not met by looking at this?

A. Except where it is annotated, for example, at the bottom of the same page, refers to two patients' records which were reviewed.

Q. CBC and urinalysis reports.

A. I am not sure what the CBC is.

Q. Does that mean there is a state law—federal, state, or local law—that requires that the records have urinalysis reports in them?

A. I would have to ask someone. I don't do the inspections, Your Honor. I don't have a specific knowledge. It is the surveyor herself who has knowledges of the state and local laws, would be able to tell that.

BY MS. HATHAWAY:

(92) Q. The facility received its notification of non-renewal on May 17. Did it file a reconsideration request?

A. It did file a reconsideration request, yes.

Q. Have you acted upon that request?

A. The documentation that we received—

THE COURT: Just answer the question, please.

THE WITNESS: Yes, we have.

BY MS. HATHAWAY:

Q. Have you sent a formal notification of the results of the reconsideration?

MR. POSNER: I am sorry, what was the question? You are facing the witness, and I can't hear you. I am so sorry.

BY MS. HATHAWAY:

Q. Have you sent a formal notification of reconsideration?

A. No, we have not.

Q. Why not?

A. We were requested by the nursing home to hold up any formal decision pending receipt of a number of materials pertinent to their case.

Q. Have you received those materials?

A. We have received some as of the 20th of July. We have to my knowledge not received all of the materials, no.

Q. And can you summarize for us the factors which led you to-make a decision not to review the provider agreement for this facility?

(93) MR. POSNER: Objected to, sir.

THE COURT: Objection overruled.

THE WITNESS: The factors leading up to the decision are based on a long history of non-compliance over a considerable period of time where we or the State agency has gone in and continued to find the facility out of compliance with some very serious conditions.

BY THE COURT:

Q. Name one or two.

A. The supervision by physicians and nursing—

Q. It says "Supervision of physicians" in the report.

A. This refers to making sure that the physicians are properly supervising the patients' care.

Q. What does that mean? The problem throughout here is it is all general categories without any specifics.

A. The specifics should be contained, Your Honor, in the plan of correction.

Q. Well, how can you have a plan of correction when it says, "The governing body and administrator

or not enforcing rules and regulations relative to the health care and safety of the patients as evidenced by lack of supervision of physician services, nursing services, and medical records"? Now, how can anybody respond to that except in the general way which they did?

A. That is explained to the parties during the time of the survey and the fact that they are able to come back with a plan (94) of correction, which is the righthand side of the form, which indicates that they do understand what was said.

Q. The point I am getting at is, you listed this as a very serious violation. Yet you don't give any specifics in the charge, and they don't give any specific in their plan obviously. And I still don't know what the serious deficiency is. What are the—

A. Your Honor—

Q. —serious aspects of it?

A. I must be honest. I have not worked on this case myself. I am in charge of the regional office. I was appointed to that position about a month ago. I was not involved in the decision-making process at the time the determination was made.

THE COURT: Then I will reverse my previous ruling and sustain the objection. If you didn't make the decision, obviously you can't be questioned.

BY MS. HATHAWAY:

Q. Mr. Szuc, will you make the reconsideration determination?

A. The way—I have the authority to make the reconsideration decision. However, presently the

normal way of handling that would be to have one of my division directors would make the initial decision and I would reserve the right to make the reconsideration decision in this case.

However, because I do not have a division director to be fair to the facility the way I would handle the (95) reconsideration is to send it to our headquarters in Balitmore and ask them to make a completely independent review of the case.

Q. I have one final question.

Do you have authority to issue a provider agreement if there are conditions of compliance, conditions of participation out of compliance?

A. I do not have that authority.

MS. HATHAWAY: Thank you. That is all.

THE COURT: Any questions?

Cross-Examination

BY MR. POSNER:

Q. Do you know who composed the survey team that made this inspection, sir, of your own knowledge?

A. Of my own personal knowledge, I do not know.

Q. Do you know their qualifications of your own personal knowledge?

A. Since I don't know the individuals specifically who conducted the survey, the answer is no.

THE COURT: It says here "Claire Richards; title, registered nurse."

Over on the right the State survey agent is Jay E. Laff, Director, Division of Long-Term Care. I don't know what that means.

At least one of them was a nurse.

THE WITNESS: Yes.

(96) BY MR. POSNER:

Q. May I ask you, sir, you have been on the job for one month you said?

A. That is correct, sir.

Q. You knew this case was in progress, did you not, sir?

A. During the month?

Q. Yes.

A. I would have been aware of it during the past couple of weeks, yes.

Q. Did you decide to go down to visit Town Court Nursing Home in order to satisfy yourself as to the conditions that might exist there and make an inspection in order that you in your own mind would know what you were talking about in this case?

A. That was not necessary, sir.

Q. Who is Robert J. Taylor?

A. Robert J. Taylor was former Director of the Office of Long Term Care Standards and Enforcement. He is presently one of my regional—one of my directors.

Q. As of May 17, 1977, was he authorized to act for your department?

A. He was.

Q. As of July 19, 1976, do you know whether or not he was authorized to act for the department?

(Pause.)

A. The reason I hesitate some is redelegations were made on (97) or about that time. I am not sure of the exact date, but I believe he did not at that point in time. I will have to verify that.

(A one-page letter from the Department of Health, Education and Welfare to Town Court Nursing Center, dated July 19, 1976, was marked Plaintiffs' Exhibit No. 11 for identification.)

BY MR. POSNER:

Q. I show you what has been described—

A. Excuse me, can I answer for clarification? Is that in order?

THE COURT: Sure. What is the problem?

THE WITNESS: I did know—did you say July 19, 1976, or '77?

BY MR. POSNER:

Q. '76.

A. I do know. I have knowledge of that. He did have the authority on July 19, 1976. I thought you meant '77, I am sorry.

Q. Now, sir, as of July 19, 1976, were you aware that Mr. Taylor pursuant to his authority addressed a letter to Town Court Nursing Home (handing to witness)?

A. I was not aware of it.

Q. And you have it in front of you in the form of P-11?

A. Yes.

Q. Now, sir, may I refer you to two paragraphs of that letter particularly. One is the third paragraph and then the fourth (98) paragraph.

Q. Would you be good enough to read it?

A. Yes.

"April 14, 1976, is the earliest possible effective date for your agreement. On that date a survey was performed which found you had corrected all of the deficiencies which had caused the involuntary termination of your facility, which took effect October 31, 1974."

The fourth paragraph:

"Surveys prior to the April 14, 1976, survey found that the deficiencies which had caused your termination from the program had not yet been fully corrected. Section 1866(c)(1) of the Social Security Act and Regulation 20 CFR 405.616 precluded your readmission to the program until the reason for your termination had been removed."

That is the end of the fourth paragraph.

MR. POSNER: Thank you. That is all.

No further questions.

THE COURT: Recessed until tomorrow morning at 10 o'clock.

(Adjourned at 5.p.m. until 10 o'clock Wednesday, July 27, 1977.)

(99) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

Philadelphia, Pennsylvania
July 27, 1977

Before Hon. John P. Fullam, J.

PRELIMINARY HEARING

Appearances:

Fox, Rothschild, O'Brien & Frankel by Nathan L. Posner, Esq., Jeffrey B. Albert, Esq., for Plaintiff Town Court Nursing Center, Inc.

(100) Saul Levit, Esq., for Additional Plaintiffs

Faith M. Angell, Esq., Deputy Attorney General, for Secretary of Public Welfare—Commonwealth of Pennsylvania

Margaret Hathaway, Esq., Assistant Attorney General, for Secretary of the United States—Department of Health, Education and Welfare, Defendant

Jennifer A. Stiller, Esq., Assistant Attorney General, for Department of Health—Commonwealth of Pennsylvania

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(101) (Commenced at 10:10 o'clock a.m.)

THE COURT: Anything further in the Town Court matter?

MR. LEVIT: Good morning. I am Saul Levit. I am here for William Coyle. He teaches some mornings.

THE COURT: I hope he teaches students as well as some mornings.

Anything from the defense?

MS. ANGELL: Excuse me, Your Honor, I think counsel would like an opportunity to see you in chambers.

THE COURT: All right.

(Conference in chambers at 10:11 o'clock a.m.)

(Discussion off the record.)

(The following on the record at 10:50 o'clock a.m.)

THE COURT: I will note for the record that all of the exhibits which were referred to by the witnesses and identified yesterday have been received in evidence and will be deemed part of the record.

(Plaintiffs' Exhibits 1 through 11 and Defendants' Exhibits 1 through 6 received in evidence.)

THE COURT: I will note further that I have at counsel's request met with them in chambers and they in turn have met with each other, and it is my understanding that the Order which is about to be entered, while not consented to by any of the defendants, probably is not terribly inconsistent with their views as to an appropriate disposition.

(102) Specifically on the basis of the evidence which has been presented, it is my feeling that the harm which would be done to the patients as well as to the corporate plaintiff by the cessation of funding would be devastating and irreparable whereas there can be serious question as to the jurisdiction of this Court with respect to the merits of the controversy. I believe this Court does have jurisdiction for the limited purpose of maintaining the status quo during the period when the administrative action on the application for reconsideration is undergoing its routine processing and completion.

Since it is clear on the record that the continuation of patients in that nursing home during that period would not be inconsistent with the continued health and welfare of the patients—in other words, none of the alleged complaints bear on any serious safety or health hazards—under all those circumstances the following Order is entered:

That the Temporary Restraining Order heretofore entered shall remain in effect pending completion of administrative action on the pend-

ing application for reconsideration and until the defendants give to the plaintiffs at least five days' written notice of their intention again to terminate funding.

It is understood that during this period the funding will not be curtailed or cut off and that the defendants will not systematically or otherwise intentionally remove patients from the home except in cases where that is the patient's own voluntary (103) choice or in cases of medical necessity. In short, there will be attempt to simply transfer patients for the sake of putting them in some other place rather than this.

And it is understood that there will be no prohibition during this interim period against placement of additional patients at the home.

I believe that covers it, does it not?

MR. POSNER: It is satisfactory to me, sir.

THE COURT: O.K. Good luck with the administrative review. I hope it proceeds expeditiously.

Thank you all.

(Concluded at 10:56 o'clock a.m.)

226

1526-36 Lombard Street COBBS CREEK NURSING HOME Wolfgang Rapp, Architect

P-1

PLAINTIFFS' EXHIBIT NO. 2 290½a

P-2

PLAINTIFFS' EXHIBIT NO. 3

Commonwealth of Pennsylvania
Department of Public Welfare
Harrisburg, Pennsylvania 17120

May 20, 1977

Office of
Medical Programs
Certified Mail Number: 627088

Mr. Donald Lewis
Administrator Provider Number: 0400357

Town Court Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Dear Mr. Lewis:

The Department of Health, Education, and Welfare (HEW) has notified the Department of Public Welfare that your participation under Title XVIII of the Social Security Act, 42 U.S.C. §1395cc, Medicare, will terminate effective June 18, 1977. Because the Medicare Program has terminated your participation, the Department of Public Welfare has no alternative but to likewise terminate your participation under the Medical Assistance Program. The Federal regulations, 45 C.F.R. §249.33 (a) (9) , require that a State medical assistance plan must:

> "Provide that in the case of skilled nursing facilities certified under the provisions of title XVIII of the Social Security Act, the term of a provider agreement shall be subject to the same

terms and conditions and coterminous with the period of approval of eligibility specified by the Secretary pursuant to that title, *and upon notification that an agreement with a facility under title XVIII of the Act has been terminated or cancelled, the single State agency will take appropriate action to terminate the facility's participation under the plan.* A facility whose agreement has been cancelled or otherwise terminated may not be issued another agreement until the reasons which cause the cancellation or termination have been removed and reasonable assurance provided the survey agency that they will not recur." (emphasis supplied)

Because of the requirements of HEW, your facility must be terminated from participation in the Medical, Assistance Program effective June 18, 1977.

Effective June 18, 1977, Town Court Nursing Center may no longer receive payments under the Medical Assistance Program for skilled nursing care or for services provided to Medical Assistance patients. This is due solely to the fact that HEW has notified us of your Title XVIII termination.

Should you wish to present evidence that HEW has not decided to terminate your facility from participation in the Medicare Program, you may appeal in writing to the Department of Public Welfare, and a hearing will be scheduled promptly to decide that issue. The basis for HEW's decision to terminate will not be at issue in any appeal to this State agency, although you may wish to raise such issue before HEW.

Your appeal from our decision to terminate you from the Title XIX Program because of the Title XVIII action, must be *received* by the DPW Hearings and Appeals Unit, 318 Capitol Associates Building, Harrisburg, Pennsylvania 17120, no later than May 31, 1977. An appeal which is not received by this date must be dismissed as untimely. Upon receipt of your appeal, the Hearings and Appeals Unit will inform you of the date, place and time of the hearing.

Should your facility need assistance in relocating the Medical Assistance patients to alternate facilities, please contact this office.

Any subsequent certification of your facility under the Medical Assistance Program is contingent upon total compliance with Federal requirements, including correction of those deficiencies which resulted in Town Court Nursing Center's termination under the Title XVIII, Medicare Program.

Sincerely yours,

(s) Glenn Johnson
Glenn Johnson
Director
Bureau of Medical Assistance

PLAINTIFFS' EXHIBIT NO. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania

May 17, 1977

Office of the
Regional Attorney
Mailing Address
P. O. Box 13716
Philadelphia,
Pennsylvania 19101

J. McMahon
L. Davis
E. Otter
S. Russo
W. Wells
W. Shlegel
A. Justin
J. Smith
G. Grimes

Town Court Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146

RE: Provider Number 39-5337

Gentlemen:

The Medicare Program established under Title XVIII of the Social Security Act, as amended, requires that a provider agreement with a skilled nursing facility shall, in accordance with section 1866 (a) of the Act, 42 USC 1395cc, be for a specified term not to exceed twelve months, with a fixed expiration date. Your facility's agreement expired at the close of April 30, 1977.

In order to participate in the Medicare Program, a skilled nursing facility must meet the statutory requirements contained in section 1861 (j) of the Act, 42 USC 1395 x (j), as well as all other health and safety requirements established by the Secretary in subpart J, part 405, title 20 of the Code of Federal Regulations. A participating skilled nursing facility is required to be in compliance with all of the eighteen conditions of participation for such facilities contained in subpart J.

On May 8-11, 1977, the Pennsylvania Department of Health performed a survey of your facility. That survey found that your facility does not comply with seven of the eighteen conditions of participation. The seven conditions not being complied with are:

II. Governing Body and Management	(405.1121)
III. Medical Direction	(405.1122)
IV. Physician Services	(405.1123)
V. Nursing Services	(405.1124)
VIII. Pharmaceutical Services	(405.1127)
XIII. Medical Records	(405.1132)
XV. Physical Environment	(405.1134)

Your facility's failure to comply with these conditions of participation precludes renewal of your agreement. Renewal is also precluded by the fact

that your facility has failed to maintain compliance with numerous standards which had previously been determined to be met. Please refer to 20 CFR 405.-1908 (d).

As you know, the Town Court Nursing Center's participation in the Program was terminated effective October 31, 1974 because of deficiencies which jeopardized patient health and safety. The facility was subsequently readmitted to the Program effective April 14, 1976, on the strength of a survey performed by the State Department of Health on that date. The April 14, 1976 survey found the facility in full compliance with the health care standards included in the conditions of participation. The survey performed on March 8-11, 1977 found a total of forty standards unmet. Please see attached survey and plan of correction.

As a result of the March 8-11, 1977 survey, the State Department of Health has recommended that your facility's agreement not be renewed. Because of the facility's failure to comply with seven conditions of participation, and because of its failure to maintain compliance with standards which were previously met, the State Agency's recommendation has been accepted, and the agreement with Town Court Nursing Center will not be renewed.

This letter constitutes your official notice that we are terminating your facility from participation in the Medicare Program effective June 18, 1977. If you believe that all deficiencies have now been corrected, please advise this office within ten working days.

No payment for services rendered in your facility after June 18, 1977 may be made under the Medicare Program, except that payment may be made for inpatient skilled care services rendered to Medicare beneficiaries admitted to your facility before June 18, 1977, and such payment is specifically limited to services furnished through the close of July 17, 1977. Please notify all Medicare beneficiaries admitted before June 18, 1977 that no payment will be made for such services rendered after July 17, 1977. A list showing the names and health insurance claim numbers of beneficiaries in your skilled nursing facility on June 18, 1977 should be forwarded to the Regional Medicare Director, Bureau of Health Insurance, Department of Health, Education, and Welfare, Post Office Box 8788, Philadelphia, Pennsylvania 19101.

We will arrange for the publication of a notice of the non-renewal of your agreement in a newspaper servicing the locality in which your facility is located. You will be advised of the publication date of that notice.

If you believe this determination is not correct, you may request that it be reconsidered. If you want a reconsideration of the decision, you must request it not later than sixty (60) days from the date of receipt of this notice. The request should state why you believe the determination is incorrect and should be accompanied by any supporting evidence and arguments you wish considered. The request for reconsideration should be directed to Robert J. Taylor, Director, Office of Long Term Care Standards En-

forcement, Post Office Box 13716, Philadelphia, Pennsylvania 19101.

Section 246(a) of Public Law 92-603 requires uniform standards for skilled nursing facilities under Title XVIII (Medicare) and Title XIX (Medicaid). Any facility receiving payment under either program must satisfy all the requirements contained in section 1861 (j). Since the Town Court Nursing Center does not comply with all requirements therein and we cannot renew your agreement for Title XVIII, we are forwarding a copy of this letter to the Title XIX State Agency.

Sincerely yours,

Benjamin M. Guy
Acting Regional Director

By: (s) Robert J. Taylor
Robert J. Taylor, *Director*
Office of Long Term Care
Standards Enforcement

Copy to:
Dr. Abdellah
OLTC Div. of Standards
Enforcement Division Coordination
Mr. Wortman
Mr. Alicks
MSA-CO
MSA-RO
Intermediary
BHI-RO (2)
Regional Attorney
Pittsburgh District Office (East)

OCR-RO
State Survey Agency
Single State Agency
Provider File
Reading File

PLAINTIFFS' EXHIBIT NO. 5

RE: TOWN COURT NURSING CENTER
1526 Lombard Street
Philadelphia, Pa. 19146

ANALYSIS OF STATEMENT OF DEFICIENCIES
RESULTING FROM SURVEY CONDUCTED
MARCH 8-11, 1977

PROF. TOBIAS BUND, J. D.
Management Consultant
4705 Henry Hudson Pkwy.
Riverdale, N.Y. 10471
TEL: (212) 796-4007

Dr. Bund is Professor of Health Care Administration and Director, Allied Health Programs at the French & Polyclinic Medical School in New York City. He is also a member of the Faculties of the Rutgers University, New Jersey, the School of Business Management and the School of Continuing Education of the University of Connecticut, the Institute of Health Care Administration of C. W. Post College, Long Island, New York and of Elizabethtown College, Penna. He has appeared as Guest Lecturer at the Columbia University School of Public Health & Administrative Medicine in New York, Douglas College in New Jersey, Quinnipiac College in Connecticut and many other well-known educational institutions.

He has been actively engaged in the field of Public Health for more than twenty-five years and serves as a Consultant to all types of health facilities—hospitals, nursing homes, senior citizen projects, intermediate care and health related facilities and other health related organizations.

For many years, he served as Professor of Public Health Law, Mortuary Law and Applied Psychology at the McAllister Institute in New York City; as Chairman of the Law Committee of the National Ass'n of Schools of Mortuary Science; as a Consultant to the Funeral Service Industry and as Special Legal Consultant to the Office of the Medical Examiner of the City of New York.

At the present time, Dr. Bund serves as a member of the Council of the Pan American Medical Ass'ns. Sections on Hospital Administration and Geriatrics; as a Lecturer for the New York and New Jersey State Departments of Health; as Consultant Examiner for the New York State Civil Service Commission; as Executive Secretary of the Society of Licensed Nursing Home Administrators of New Jersey; as Consultant to the Therapeutic Activists Section of the New Jersey Recreation and Parks Association and as a Consultant to the many religious, non-profit and proprietary organizations engaged in the building, maintenance and operation of health care facilities throughout the East Coast.

Dr. Bund has appeared as Guest Speaker at meetings of civic, educational, charitable, religious, political, professional and governmental agencies, organizations and societies.

RE: TOWN COURT NURSING CENTER
1526 Lombard Street
Philade'phia, Pa. 19146

ANALYSIS OF STATEMENT OF DEFICIENCIES RESULTING FROM SURVEY CONDUCTED MARCH 8-11, 1977.

INTRODUCTION:

This Analysis of the Statement of Deficiencies was made after a detailed survey of the above named Facility conducted by the undersigned during the period June 4-7, 1977 inclusive.

Each section of the Statement will be analyzed in the same sequence as it appears thereon for purposes of ready reference.

CONFORMITY WITH FEDERAL, STATE AND LOCAL LAWS:

1. The Regulation herein cited (405.1120 (c)) makes no reference to any requirement that there be a written agreement with an Intermediate Care Facility. The Regulation cited refers solely to the adoption by the Governing Board of various policies.

2. Again, the Regulation cited makes no reference to the materials cited as a deficiency. Regulation 405.1120 (c) deals solely with the adoption by the Governing Board of various policies.

COMMENT: A review of the Administrative Policies and Procedures indicates that proper policies as required by the aforesaid Regulation were adopted

by the Governing Board of this Facility. There appears to be no relationship between the alleged deficiencies and the stated Regulation.

GOVERNING BODY AND MANAGEMENT:

3. The stated deficiency hereunder is and followed by the citing of Reg. 405.1121 (c), (e) and (k) is evidently a conclusion drawn by the individuals responsible for drafting the Statement of Deficiencies.

A reading of each of the sub-paragraphs of the cited Regulation indicates that the Facility has complied with each of them:

Standard (c) requires the governing board to adopt by-laws and policies.

Standard (e) requires the appointment of an Administrator with overall responsibility for the operation of the Facility, and

Standard (k) requires the adoption of a Patients' Bill of Rights.

GOVERNING BODY AND MANAGEMENT:

COMMENT: A review of the Administrative Policies and Procedures of the Facility indicates that all of the foregoing Standards had been complied with. The Manual contained By-Laws and other Policies relating to the operation of the Facility and same had been adopted by the Governing Body. An Administrator was duly designated by the Governing Body and given overall responsibility for the operation of the Facility. A Patients' Bill of Rights was contained in the Administrative Policy and Procedure Manual.

Citing "lack of supervision of physician's services, nursing services and medical records" as evidence that the Governing Body and Administrator are not "enforcing rules and regulations" has, again, no relationship to the Regulation cited. It does, however, indicate to this Reviewer the attitude with which the Statement of Deficiencies were written.

4 (a) and (b): At the time of your Reviewer's survey, a review of the files of the Facility's employees indicated that Reg. 405.1121 (g) had been fully complied with by the Facility.

5. Documentation relative to an In-Service Program relating to confidentiality of patient information was on file at the Facility. Such documentation bore the date 12/27/76.

COMMENT: Your Reviewer questioned various staff members of the Facility at the time of his survey as to In-Service programs conducted by Administration and various Department Heads and was advised by such staff members that they were participating in In-Service programs and that the subject matter relative to Patient's Rights and confidentiality had been discussed with them as well as a host of other topics of a general nature and topics and subject matter relating to their specific departments and work assignments.

6. At the time of your Reviewer's survey, a policy and procedure relative to informing patients of related charges had been adopted by the Facility.

A policy and procedure was in the midst of preparation at the time of your Reviewer's survey rela-

tive to providing patients with a quarterly accounting of financial transactions.

6 (a)-(j): Interviews with staff members on various shifts were held by your Reviewer. Staff members advised that they were constantly being reminded by their Supervisors as to the importance of treating patients with dignity and respect. The staff also advised that they had received In-Service programs concerning this very subject matter on more than one occasion.

COMMENT: One of the major problems of the nursing home industry is and continues to be that of obtaining adequate personnel on the lower staff levels.

PHYSICIAN SERVICES:

7. At the time of your Reviewer's survey, new forms had been adopted which would include the individual rehabilitative potential of the patient and were, in fact, already on some of the patients' charts reviewed.

Procedures were being developed to implement new policies which were adopted by the Medical Director Consultant Committee at the time this review was made.

COMMENT: It is interesting to note that while the items mentioned under the caption "Physician Services" as deficiencies, which come under Regulation 405.1123, were so delineated, reference to other Standards of other numbered Regulations are also listed. Again, it is evident to this Reviewer that the

individuals comprising the Survey Team were making a "point" of building a record in the instant matter.

NURSING SERVICES:

8. Indicating that Regulation 405.1124 (a) requires a written procedure cleaning combs and brushes to be available and citing the absence of such as a deficiency under such Regulation is completely and totally without foundation without stretching the imagination to an unreasonable degree.

COMMENT: Your Reviewer has studied, analyzed and reviewed approximately 100-150 Policy and Procedure Manuals for all types of health care facilities including but not limited to hospitals, extended care facilities, skilled nursing homes, intermediate care facilities, health related facilities, etc. In not one of the aforesaid Manuals has your Reviewer ever encountered a procedure for cleaning combs and brushes.

It should be noted that the deficiency cited does not even indicate that an unclean comb or brush was observed at the time of the Survey.

9. Neither Standard (b) or (g) of Regulation 405.1124 require the use of Assignment Sheets and no reference is made therein to same. Standard (b) relates to the duties of the Charge Nurse while Standard (g) deals with Administration of Drugs.

COMMENTS: While some facilities use Assignment Sheets, there is no mandated regulation for the use of same. Certainly, the absence of an assignment

sheet for staff has absolutely nothing to do with the regulations relative to the administration of drugs by individuals properly properly permitted to do so.

10. (a)-(f): The deficiency cited herein states that there was "inadequate" documentation on patient care plans and several instances (paragraphs a-f) are presented as proof thereof.

COMMENT: At the time of your Reviewer's survey, patient care plans were in the process of being updated by the various professional disciplines required to be concerned therewith. Various records, such as nursing care plans, activity program evaluations, dietary counselling interviews with patients, were being reviewed and updated, Similarly, social service records pertaining to patient needs were being reviewed and up-dated. Documentation was available to your Reviewer which indicated that physicians had been contacted and advised of the necessity of providing short and long-term goals for their respective patients. Arrangements were also being made with regard to meeting the patients' dental needs.

11. The deficiencies stated herein as being violative of the stated Regulation 405.1124 (e), (a) and (c) do not state that patients are not receiving rehabilitative services. At the time of your Reviewer's survey, documentation was available to indicate that there was an on-going rehabilitative program.

COMMENT: Complaints about lack of documentation is quite universal in the nursing home field. Lack of documentation, per se, does not necessarily

mean that programs are not in effect. Too, the Regulation hereinabove referred to, 405.1124 (e) does not specifically require that range of motion exercises given to patients necessarily be documented. The Standard requires that there be a rehabilitative program. Interpretative guideline (e) 2 (f) relates to nursing personnel "Assisting patients with their routine range of motion exercises". If such assistance is rendered by Aides and Orderlies as part of their daily routine, the requirement is met. Aides and/or orderlies generally do not document information on patients' charts.

During the period of your Reviewer's survey, unannounced visits were made to each and every nursing area of the Facility. Your Reviewer observed Nurses and other nursing personnel positioning patients, including patients confined to bed. At various intervals during the days of the survey, your Reviewer observed patients confined to bed being properly turned in bed. Too, patients were being assisted with ambulation for various time periods and then carefully seated in geriatric chairs.

Of special note, mention is made herein of the exceptionally fine rehabilitative program conducted by the Facility's Physical Therapy Department. Your Reviewer observed the Director of this Department, on several occasions, discussing procedures to be followed by nursing personnel for patients receiving physical therapy treatments.

12. (a)-(d): Stating that "Nursing personnel are not aware of the nutritional needs of the patients" followed by observations listed under (a)-(d) as

proof thereof is an unwarranted conclusion not substantiated by the facts.

(a) In this instance two patients were observed feeding themselves although there were physician's orders that they be fed. It is not unusual for nursing personnel to encourage the patients to make every attempt to feed themselves or do other things to assist patients in reaching their rehabilitiative goals. Physicians very often suggest to nursing personnel that they should attempt to have the patient feed themselves as a means of encouragement. The reported fact is that the patients were feeding themselves which evidences progress made by them with the help of nursing personnel.

(b) Lack of documentation does not necessarily mean that the fluids were not provided.

(c) The conclusion drawn by the Survey Team in this instance is not a proper one. If the Team observed the trays at the patient's bedside or on an overbed table in the patient's room, then it would be proper to assume that the trays were delivered to the proper patients and there would be no further need to identify the trays. If the Team observed the trays outside of the patient's room and after same had been removed therefrom, it is doubtful if any of the trays being returned to the Dietary Department could be identified as being the tray of any particular patient. It should also be noted that the fact that two trays only evidenced the consumption of beverages only indicates that, for one reason

or another, the particular patients had no desire to eat their breakfast. It is not unusual for patients to decline to eat at times.

During your Reviewer's survey, patients were observed in the various dining areas and in their rooms at meal-times. Most of the patients ate well; some did not eat all of their food; some requested and were provided with additional food after a check was made with the Charge Nurse. A number of patients were talked to by your Reviewer as to the food provided them by the Facility. Overwhelmingly, the consensus of opinion was that the food was very good and that they enjoyed their meals.

(d) The 8 ounces of water should have been provided with the patient's meal.

13. At the time of the survey, medications were being poured and administered by professional personnel. The personnel folder of each and every professional employee was reviewed in detail. Thereafter, professional nursing personnel schedules were checked and then, such staff, on duty, was observed when preparing medications and administering same. At all times during the survey period, either Registered Nurses or LGPN's were handling this function.

14. Your Reviewer investigated the procedures relative to obtaining medications ordered by physicians for patients. The procedures are in accord with general practice.

COMMENT: In making enquiries relative to medications which were not available at a particular time

during the survey made by the Survey Team, your Reviewer was advised that undoubtedly the medication had been ordered but not as yet delivered by the pharmacy.

It should be noted that no check was evidently made by the Survey Team to see if the various patients' medication sheets, for whom the items listed hereunder were ordered, indicated that they had or had not received the said medications up to the time same were found to be unavailable or whether or not the Survey Team made any enquiry as to whether or not such medications would be available for the next administration thereof as prescribed.

15. Your Reviewer observed the recording of all medications administered during the time of his survey.

16. During the period of his survey, your Reviewer observed the pouring of medications and found them to be done as required.

17. Your Reviewer was provided with a copy of letter sent by the Medical Director of the Facility to attending physicians reminding them of their obligation to counter-sign verbal orders.

COMMENT: The failure of physicians to comply with requirements such as counter-signing verbal orders is one found throughout the profession. A large number of facilities are faced with the very same problem. Efforts are constantly being made by Administrators to have attending physicians fulfill their obligations.

18. During your Reviewer's survey of the Facility, every patient's room was visited and a check made of the bed-side cabinets. No medications were found therein.

DIETETIC SERVICES:

19. The Food Service Supervisor is a full time employee of the Facility. This was verified by a check of his payroll records.

20. Regulation 405.1125 (a) does not specify any particular number of hours of service to be provided by the Consultant Dietician. The Regulation provides that "if consultant dietetic services are used, the consultant's visits are at appropriate times, and of sufficient duration and frequency. . . ." Similarly, the interpretive guidelines for such Regulation do not specify any specific number of hours to be provided by the Consultant Dietician.

21. (a)-(b): At all times during your Reviewer's survey, the meals served were in conformity with the planned menu for the day. In addition, appropriate substitutes were available, if needed.

22. At all times during the survey, tray identification cards remained on the patient's tray until after the complete meal had been served to the patient.

23. During your Reviewer's survey, on three separate occasions, while your Reviewer was observing patients during meal times, patients who requested food other that that which was being served were provided with same upon the request of the Charge Nurse to the Dietary Department.

COMMENT: Your Reviewer paid particular attention to the Dietary Department during his survey. The Department is well operated by the Food Service Supervisor who appeared to be well versed on the nutritional needs of the patients. He also evidenced a real concern for the patients.

The vast majority of patients interviewed by your Reviewer indicated that they were well-satisfied with the meals provided to them by the Facility.

PHARMACEUTICAL SERVICES:

24. A random sampling of medications was made by your Reviewer and each and every medication selected was properly labeled when checked against the physician's order.

25. At various times your Reviewer observed the pouring and administration of medications. At each such time, the Nurses properly checked the records. In addition thereto, Nurses were observed carefully checking patient identification bracelets before administering medications.

LABORATORY AND RADIOLOGIC SERVICES:

26. Your Reviewer reviewed the new policy and procedure adopted by the Medical Direction Consultant Committee and was advised that same was in full force and being implemented.

DENTAL SERVICES:

27. Documentation was available to your Reviewer at the time of his survey indicating that Dentist was participating in staff development programs.

SOCIAL SERVICES:

28. At the time of you Reviewer's survey, a full time Social Service Worker was on the payroll at this Facility. During the same time, and on several occasions during the survey period, your Reviewer met with the Facility's MSW Consultant who has all of the requirements mandated by the Regulations.

PATIENT ACTIVITIES:

29. At the time of this survey, the Recreational Director was most active with the patients. In addition, activities were being brought to bed-ridden patients as well. New recreational programs were being planned and some new programs had already been implemented.

MEDICAL RECORDS:

30. (a)-(g): A random sampling of approximately twenty-five (25) records was made by your Reviewer and all were in order with the exception of one (1) record which required a physician's signature for a verbal order. Your Reviewer was advised that the physician was expected that morning to counter-sign his verbal order. A check later that same afternoon of the record indicated that, in fact, the physician had been in and did counter-sign the order.

31. A review of the Facility's policies indicated that physicians are required to complete Discharge Summaries.

A check of several records of discharged patients contained the required summaries.

COMMENT: The failure of physicians to comply with requirements is a rather common problem in many health care facilities. Rules and regulations, insofar as they relate to physicians, are most difficult to enforce primarily because of the attitude of the physicians.

PHYSICAL ENVIRONMENT:

32. At all times during your Reviewer's survey, nursing personnel were observed in attendance in lounge areas where patients were congregated.

33. Hazardous areas were identified for the benefit of blind patients at the time of your Reviewer's survey.

34. Your Reviewer was advised that a waiver had been requested from the Department of Health with regard to a visual warning system.

35. Patients were so placed so as to be in reach of call bell system without difficulty.

Reviewer was advised that new cubicle curtains had been ordered.

PHYSICAL ENVIRONMENT:

36. (a)-(u): At the time of the survey, a new quality control system was in effect. Repairs had been made to most of the specific items listed hereunder. During the survey visit, maintenance people were busily engaged in repairing furniture, tightening handrails and grab-bars, fixing peeling wallpaper and making other similar repairs.

37. Thermometers were available at the nursing stations.

No strong urine odors were present on any floor of the Facility at the time of this survey.

37. (a)-(k): None of the conditions listed hereunder were in evidence at the time of this survey.

COMMENT: It should be noted that at any time it is possible for an incontinent patient to have an "accident" due to inability to control body functions. There can be no question but that an offensive odor will result temporarily until the matter is rectified. Strong odors can only develop and remain constant if there is continual neglect. There was absolutely no evidence during this survey of any strong, lingering odors on any of the patient floors or any of the other areas of the Facility. In fact, your Reviewer was quite impressed with the manner in which the Housekeeping staff performed their duties and the concern they exhibited for the patients.

INFECTION CONTROL:

38. None of the conditions listed hereunder or any such similar condition existed at the time of this survey.

39. (a)-(g): A new system for handling linens and laundry was introduced and was in effect at the time of this survey.

DISASTER PREPAREDNESS:

40. Records were reviewed relative to In-Service programs relating to fire drills. These were in order and it was evident therefrom that staff had been provided with information as to the procedures to be followed.

UTILIZATION REVIEW:

41. Regulation 405.1137 (b) discusses the composition of the Utilization Review Committee. Standard (b) states: "The committee or group responsible for utilization review is composed of two or more physicians and, optionally, other professional personnel". There is no specific requirement that, if the committee is composed with only two physician members, that both must be present at all times. The important aspect is that no physician reviews any case in which he was professionally involved.

PLAINTIFFS' EXHIBIT NO. 6

Report of William J. Jones

An Evaluation of the Town Court Nursing Center
June 1977

I. *Introduction*

This study of the Town Court Nursing Center, 1526 Lombard Street, Philadelphia, Pennsylvania 19146 was requested and authorized by Leonard Coyle, Esq. and the corporate owners of the Center. The impetus for the study was an order for decertification of the facility from the Medicare and Medicaid programs, Title 18 and Title 19 respectively of the Social Security Act. The order for decertification was the result of alleged deficiencies noted in the operation of the Center by the Pennsylvania Department of Health Survey Team during an inspection conducted March 8-11, 1977.

My Charge was to objectively review the operation of the Center and to evaluate the services with specific reference to the alleged deficiencies as they relate to my area of expertise. The author had never heard of the Town Court Nursing Center and began this study without preconceptions or biases.

II. *Methodology*

The method of study was as follows. I visited the Center on June 13, 1977 where the first task was to review the inspection reports of March 8-11, 1977.

Also, I reviewed pertinent correspondence and previous inspection reports of the Center. I then toured the Center extensively. I inspected patient care and living accommodation areas. I interviewed patients at random and in depth. Any visitors, family or friends who were on the premises were also interviewed in depth. I spoke informally with staff. I interviewed Mr. Donald B. Lewis, the Administrator, in detail. Finally, I observed a fire drill conducted by the Center. These activities consumed a full day from 8:50 a.m. to 5:45 p.m. with the exception of a twenty minute lunch break.

Obviously, the purpose of my approach was to evaluate:

1. Physical Plant (Environment)
2. Patient Care
3. Attitude of patients and family
4. Administration
5. Compliance with standards

The following report was written based upon the foregoing visit, study of various documents, interviews, and my notes and reflection on these data.

1) *Physical Plant*

The physical plant is a fairly modern multi-storied building which is light and pleasant. Maintenance appears good. Housekeeping is excellent with floors and equipment clean. Patient bedrooms, ranging from private, single bedrooms to four-bed rooms were light, clean and cheery. Bed linen was clean and fresh. Most important, to the trained observer, bed frames were clean indicating good housekeeping

procedures. No offensive odors were detected, nor was there any odor of disinfectants.

Several small maintenance problems were observed including, inter alia, a broken window frame and the front of a radiator cover pulling away. These certainly do not pose a threat to the health or safety of patients nor staff. They do, however, require attention.

Generally, the physical plant as related to 20 CFR 405.1134 is, in my opinion, in substantial compliance. I would rate the center in the 75th to 80th percentile when compared to the universe of long term care facilities.

One note is important to recognize, which is that any facility has on-going maintenance problem. Anyone can visit any facility, be it nursing home, hospital, public building, or even one's own home, and at any given point in time can detect things which must be or should be corrected. Consequently, the rule of reasonableness must be applied when conducting an inspection. With this rule in mind, it is my professional opinion that the Town Court Nursing Center substantially meets requirements.

It appears that the draconian conclusions of the surveyor(s) with reference to the physical plant smack of over-zealousness.

Interviews with patients and visitors confirmed that no special effort was made to clean the facility for the purpose of impressing the author. Patients and visitors alike testified that the clean conditions found on June 13, 1977 were the usual. Not one

patient and/or visitor complained of inadequate housekeeping and/or maintenance, even when encouraged to complain.

2) *Patient Care*

Without delving into medical diagnosis or prescription for pharmaceutical or therapeutic procedures, which are not in my area of expertise, I reviewed the care provided patients.

Patients were clean and without detectable body odor. Clothing was clean and appeared fresh (patient clothing is exchanged every second day). I specifically looked at patients' hands for signs of neglect. All patients interviewed had clean hands and manicured fingernails. More importantly, I randomly checked 12 patients' toenails for any sign of neglect. All had appropriate pedicures with clean feet. As we teach, the review of foot care is a more viable tool to evaluate nursing care than the obvious review of fingernails. The female patients appeared to have their hair combed or brushed. None were noted to have had professional beautician services as evidenced by lack of setting or waving. Many male patients were sporting a two (2) day growth of beard. Apparently males are shaved twice a week by attendants. While the services of a barber, who also shaves, are available, few patients are willing to spend the $2.00 for shaving. When staff was questioned as to why "personal incidental" money was not used to buy shaving equipment, especially electric razors, they replied there was a security problem. Consequently there was a concern that these items, if purchased, would "walk off the premises."

The author is empathetic with the problem since *all* health care facilities, as well as industry, suffer from this phenomenon. However, it is recommended that male patients capable of shaving themselves be encouraged to do so. Also, the Center should give serious thought to providing the means to carry out this activity.

"Development of decubiti is prima facie evidence of poor nursing care. Healing of decubiti is evidence of good nursing care." Dr. Henry Kessler, world renowned orthopedic surgeon and founder of the Kessler Institute for Rehabilitation, has long preached and taught the above cited principle. Using this axiom I must confess I was impressed with the care given at Town Court. Specifically, there is no evidence that a decubitus developed on any patient *after* admission to the Center. There is evidence that patients admitted from hospitals were admitted with decubiti. The decubiti *were healed* at the Center.

Further, I note that the Pennsylvania Department of Health inspectors noted, "a patient in Room 510 was observed lying on her decubiti ulcer (with no dressing) in cold urine." This statement is illuminating. First, it appears that basic nomenclature used to describe conditions is not known to the inspector —decubiti is plural—ulcer is singular and redundant. So did the patient have one bedsore or more? Second, how does one determine if the urine was cold? Last, did the inspector determine that the physician ordered the ulcer dressed? (Or, does the inspector make the decision that the ulcer should be dressed?)

This author particularly sought out this patient and investigated her present condition. This patient is now "clean" with no bedsore(s). One is forced to ask if the care was so bad as indicated in the inspector's report, how could the patient's bedsore be healed?

This author observed no patient, with one exception, sitting or lying in urine. The one exception was a patient on the fourth floor who had an "accident" while being interviewed by the author. I didn't summon aid. However, within ten minutes an employee came to the room and was observed assisting the patient.

I observed one problem which should be reviewed and corrected; namely, inadequate wheelchairs. Several patients were in wheelchairs without footrests. As a result, a patient had to be pulled backwards so that his feet dragged on the floor (to push the patient forward could obviously cause damage to the patient). Anyone familiar at all with physical medicine knows that wheelchairs are a prescription item and must be provided for each patient's specific need. It is obvious that whatever wheelchairs are available are Center equipment and not generally prescribed for each patient. On the other hand, the cost of prescribed wheelchairs is too onerous for this or any other similar medical facility. Therefore, this situation can only be equitably resolved if the Title 18 and Title 19 programs recognize their responsibility and permit and pay for the purchase of prescribed wheelchairs. Without this it is my opinion that the Center, or any other health facility must gerrymander equipment.

The services of a consulting psychiatrist should be considered.

3) *Patient Attitudes*

Recent court decisions and patient rights regulation and activity have established the tenet that the patients' attitudes, comments and judgments must be considered in evaluating care received by the patients. It is evident that patients must have the ability to make knowledgeable judgments. The author takes the position, therefore, that patients' observations on the palatability of food, the cleanliness of the facility, the attitude of staff, et al are areas whereby the facility can be partially assessed.

The Town Court Nursing Center as evaluated by the patients and/or relatives in the areas within their competence receives high ratings. The author was impressed by the many instances of high praise. The following few examples are included to certify this conclusion.

Patient "A" is a private patient. She was readmitted to Town Court on the day the author visited the Center. Her husband was in the patient's room where I interviewed him and his wife. It was related that the patient had previously been in Town Court and then discharged to a hospital. On being discharged from the hospital the patient and her husband insisted on returning to Town Court. Both the patient and her husband are learned people. The husband is a successful engineer. Both related to me their reason was that the care at Town Court was superior to other facilities. Also, they had numerous other options of nursing homes to choose from since they were private payors (apparently paying twice as much as the State of Pennsylvania pays for Title 19 recipients). Their testimonial speaks well of Town Court.

Patient "B" is a medicaid recipient who was previously in (deleted) Nursing Home. Also interviewed was the patient's daughter who was visiting her mother. The daughter related that her mother had developed a bedsore while in a hospital. This sore was not healed while in the (deleted) Nursing Home, which she described as "terrible." She insisted on a transfer to Town Court and this was accomplished. The previously unhealed bedsore was treated and healed at Town Court. Both the patient and daughter stated that Town Court provided "excellent care, good food and good activities."

Patient "C" is an aged lady who was interviewed in the presence of two of her sons. Like patient "B" she also had been in another nursing home prior to coming to Town Court. Both sons testified that Town Court "is as good as, if not better than, (deleted) Nursing Home." They have "no complaints whatever."

Patient "D" is presently awaiting discharge to a religiously oriented orthodox home. When interviewed in the presence of two friends, she stated that Town Court was an excellent place and the only reason she was being transferred was to be with orthodox colleagues. The friends of this patient commented on how "clean" Town Court is. When asked, "Is it always this clean?" they replied, "Always."

These are some of the examples of replies received by this author during his interviews. Of the numer-

ous patients interviewed only one patient had a negative comment, which was, he complained about the service. When asked to expand he stated, "The service is bad because they won't let me go home." (N.B. I was informed that the patient has no home.)

It is my opinion that the attitudes of the patients reflect a highly commendable evaluation of the Center as seen through their eyes.

Further, the Town Court Nursing Center has a patient grievance committee which reviews complaints. Valid complaints are brought to the attention of the Administrator of the home. I am informed by members of the committee that results are "very satisfactory."

Also, this home has a house paper called the "Town Court Crier" published by patients.

4) *Administration*

This author spent considerable time with the Administrator, Mr. Donald B. Lewis. I found Mr. Lewis to be a competent and committed person. He possesses all the credentials necessary to administer the Center. He is licensed by the State of Pennsylvania as a Nursing Home Administrator. Mr. Lewis is the successor to several previous administrators over the past several years. One would hope he will enjoy some tenure in this position.

Mr. Lewis is presently attempting to revise the policies and procedures of the Center to more accurately reflect and assure that standards are identified and carried out. This activity is not reflective of any existing lack, but rather is an attempt at refinement of policies. In my opinion he is making acceptable progress.

Also, Mr. Lewis verified that additional personnel have been added to staff. One person, Patricia Hayes, was employed to be the assistant to Joyce Parker in recreation activities; Doctors Berkowitz and Morrow, both dentists, have been added to the staff to conduct in-service and dental Rx programs; Mr. Irv Segal, MSW has been added; Ms. Lucas, consulting dietician, has had her time increased to seven (7) hours per week.

Mr. Lewis demonstrated that the food service supervisor is qualified and works full time. This point is important since the home received a deficiency that "The food service supervisor is not a full time employee of the facility." It appears that the surveyor was in error on this issue.

5) *Standards*

As previously stated I reviewed the Statement of Deficiencies and Plan of Correction (Form SSA-25-67) in regard to the survey completed March 8-11, 1977. At this point I would endeavor to make appropriate comments on those sections bearing on my area of expertise.

1. F 14 Reg. 405.1120 (c)

   "The written agreement with the Intermediate Care Facility has expired."

   Comment: This is not a deficiency since no regulation exists requiring a SNF/ICF to have an agreement with another ICF. I can see no logic

to listing this as a deficiency except to "pack the gallery."

2. F 14 Reg. 405.1120 (c)

"Two (2) Medical records reviewed lacked documentation of yearly blood and urinalysis reports."

Comment: One can only assume this reference is to employees health services, since this regulation refers to conformity with applicable federal, State and local laws—not to section 405.1132—Medical Records. Assuming this refers to employees health, 2 out of 67 employees reviewed indicates the program is 97% effective. This percentage exceeds most facilities. This item, in my opinion, should be an "it is recommended" and not a deficiency.

3. F 15 XRF 19 23 25 27 28 62 64

Reg. 405.1121 (c), (e), (k)

"The governing body and administrator are not enforcing rules and regulations relative to the health care and safety as evidenced by lack of supervision of physician's services, nursing services and medical records."

Comment: Res ipsa loquitur. This deficiency is apparently based on following notations which are either unfounded or have been corrected.

4. Reg. 405.1121 (g)

"The facility is not complying with its policy to have completed annual physical examinations

and chest x-ray or mantoux tests on all employees. This is evidenced by:

a) lack of documentation of mantoux tests or x-ray findings on twenty-two (22) out of sixty-seven (67) employee health records reviewed.

b) physical examination results were lacking on two (2) out of sixty-seven employee health records reviewed."

Comment: Facility changed policy. Not all employees are required to have a mantoux or x-ray except those required by law, i.e. dietary. Plan of Correction is legal and should be acceptable.

5. Reg. 405.1121 (h)

"Documentation that inservice education programs were conducted for confidentiality of patient information and accident prevention was not available for review."

Comment: Deficiency listing is inappropriate —documentation exists for inservice held on confidentiality of patient information. Plan of Correction should be accepted regarding accident prevention. When all the items of in-service as defined in this section are reviewed, and only one is cited, any reasonable person would conclude that this should be an "it is recommended" notation, not a deficiency.

6. F68, 72, 73, 75 XRF66

Reg. 405.1121 (k) (2), (6), (7), (9)

"Procedures have not been developed, in writing to inform patients of related charges and

charges not covered under titles XVIII and XIX or charges not covered in the basic per diem rate."

Comment: Corrected.

"Documentation that patients are given a quarterly accounting of financial transactions was not available for review."

Comment: Corrected.

"Three (3) patients who were observed in restraints did not have a physician's order for the restraint."

Comment: Corrected. This item should be reviewed by the physician and nursing consultant.

"The following unacceptable situations were observed:

"a) an aide was observed bathing a patient, while the surveyors were present, with the patient completely exposed."

Comment: This item is difficult since this author has no way of knowing whether the patient was being bathed in the bath and shower room when the surveyors entered. If this is the case, then the surveyors were at fault, not personnel.

"b) a patient was observed being pulled through the corridor (5th floor) clothed in only a bathrobe which was on backwards. The patient was exposed."

Comment: The language of this deficiency is rather confusing. This author has no way of

determining what "being pulled" means. Second, it is not unusual to clothe a patient in a bathrobe placed on backwards. In many circumstances bathrobes, as well as gowns, are placed backwards for the appropriate handling of patients. The fact that the patient was exposed, if indeed patient was exposed, certainly would require correction through inservice training for the staff.

"c) One (1) female patient was observed being pushed in a wheelchair to the bathroom without footwear. Care was not taken to protect the patient's feet causing one foot to jam into the door."

Comment: Staff should be trained through an on-going in-service training program to assure proper transportation of patients.

"d) Two (2) patients were observed being pushed and pulled, by the same person. This caused one patient to be pulled backwards."

Comment: I presume this relates to two wheelchair-bound patients. However, the deficiency is not specifically detailed to present enough facts for comment. As previously stated in other portions of this report, many of the wheelchairs lack footrests thereby requiring patients to be pulled rather than pushed. Further, it is recommended that the in-service program initiated by the Center would assist in rectifying any problem of this nature.

"e) Twenty-one (21) patients plus the patients in the 4th and 5th floor lounges were ob-

served with excessively long, dirty and/or unmanicured fingernails."

Comment: This author did not find any validity to this deficiency on the June 13th visit.

"f) Nine (9) male patients were observed in need of a shave, as evidenced by excessive growth of beard."

Comment: Several male patients did have more than a 24-48 hour growth of beard. It is recommended that the facility intensify its efforts in self-help activity to permit male patients who are capable of performing this function to do so for themselves. In addition, it is recommended that the services of a barber, along with attendants, be intensified to assure availability of shaving.

"g) Eighteen (18) patients were observed with poor oral hygiene (i.e. food particles in teeth and/or dentures, teeth missing, food particles on mouth, lips and gums)."

Comment: This author must question the validity of the surveyors' observation on this point. However, whatever problems exist have been or will be corrected by the appointment of two D.D.S.s.

"h) Thirty-three (33) patients plus patients in the 3rd and 4th floor lounges were observed inappropriately dressed (i.e. no underwear, no shoes or socks, diapered with a towel, stained or torn clothes)."

Comment: This author did not observe patients inappropriately clothed to the extent the surveyors noted in their report. However, it is recommended that the facility intensify its in-service training program in this area to assure proper clothing of patients.

"i) a patient in room 510 was observed lying on her decubiti ulcer (with no dressing) in cold urine. Approximately five (5) patients were observed lying or sitting in urine."

Comment: The author tracked the patient referred to and is pleased to note that the decubitus is now clean. As noted elsewhere in this report, the cleaning of decubiti is evidence of good nursing care.

"j) A patient was observed in room 514 with what appeared to be vomitous on his face, shoulder and bed."

Comment: The important factor in this observation is whether the alleged vomitous was fresh. It is conceivable that if the "vomitous" was on the patient, that it could have occurred immediately before the surveyors' observation. On the other hand, if the vomitous were stale, it would indicate a lack of observation and care on behalf of the staff. In any event, it appears to this author that if this phenomenon did occur, it is not indicative of the care given by this Center.

19. F209 Reg. 405.1125 (a)

"The food service supervisor is not a full-time employee of the facility."

Comment: From interview and records it is demonstrated that this deficiency is not correct.

The food service supervisor is a full-time employee.

20. F213 Reg. 405.1125 (a)

"Time spent in the facility by the consulting dietitian is not sufficient to provide adequate nutritional counseling for 190 patients or continuing liaison with medical and nursing staffs."

Comment: The consulting dietitian provides seven (7) hours per week consultation to the facility at the present time. It is felt that this commitment in time is sufficient for the present needs.

27. F301 302 XR F48 49

Reg. 405.1129 (a) 405.1121 (h)

"Documentation of the advisory dentist participating in staff development programs was not available."

Comment: As of June 1, 1977 two dentists, Doctors Berkowitz and Morrow, will participate in in-service training and staff development. Appropriate documentation will be provided.

28. F316 319 XR 311

Reg. 405.1130 (b) (a)

"The consultant for social services is not qualified."

Comment: This deficiency has been corrected by the employment of Mr. Irv Segal, MSW.

29. F330, 331 Reg. 405.1131 (b)

"The activities program is not meeting the individual needs of all the patients as evidenced

by patients sitting idly in the lounge areas and bedrooms on all floors."

Comment: An additional person, Patricia Hayes, has been assigned to the Activities Director on a full-time basis as of June 6, 1977.

32. F366, Reg. 405.1134

"Patients were observed, unattended, in patient lounges with no provisions for summoning assistance."

Comment: This is not a deficiency. There is no standard requiring call systems in patient lounges.

33. F388 Reg. 405.1134 (c) (5.11)

"The facility does not provide a means for the blind to identify hazardous areas."

Comment: There are presently three (3) blind patients in the Center. The administration has provided, inter alia, tapes on handles of entrances to hazardous areas.

34. F389 Reg. 405.1134 (c) (5.12)

"The facility does not provide simultaneous audible and visual warning signals."

Comment: The Center has an audible call system and has requested a waiver on the visual system. Since other facilities have been granted waivers for a visual warning system, it would appear the request of the Center should be given serious consideration.

35. F396, 397 XRF366 75

Reg. 405.1134 (e) 405.1121 (k) (9)

"Five (5) patients were observed in bed with the patient call bell out of reach. Patients who were observed sitting in chairs did not have call bells within reach.

"Privacy curtains in several patient rooms on the 2nd and 3rd floors were too short to ensure privacy in treatment and/or care."

Comment: No facility in the country has a call system that is adaptable to providing mobility to accommodate all loci of patients. To insist that every patient have call bells immediately available when sitting in chairs would mean that every hospital and health facility in the country would not be in compliance. Obviously, the patient's condition and mobility is a determining factor. I consider this listing of a deficiency to be inappropriate. I have been assured by the administrator that new cubicles for the 2nd and 3rd floors are presently on order.

36.F416, 418, 419 Reg. 405.1134 (i)

"The following were in need of repair:

a) protective cap was missing from the bed in room 511.

b) cement was cracking away from the beam in the food storage area.

c) the paper was coming off the wall on outside room 511.

d) assist bars were not provided for the toilet in the bathroom in room 511.

e) Room 412—Assist bars were not provided for the toilet, the metal door on the closet was bent and had sharp edges protruding.

f) Room 456—the dresser drawer was missing a piece on the bottom

g) Room 309—the dresser drawer had no handles

h) Room 313—radiator cover was broken

i) Room 314—side-rail on the patients bed was broken the radiator cap was missing, the radiator cover (in the closet) was coming loose from the radiator, plaster was flaking above the radiator in the closet.

j) Room 415—the sink in the bathroom was coming away from the wall.

k) Trash was observed stored in the fire exit stairwell (original building) on the 4th and 5th floors.

l) Fifth floor dining room—burn marks were observed on the floor

m) Call bells were not functioning in rooms 353 and 550.

n) Room 509—wall paper was peeling off the wall

o) Room 517—corner baseboard radiator cover was loose and the overbed light was not functioning

p) Room 517—(tub room) had broken tiles

q) Room 351—the cover for the commode was broken

r) Water fountain (3rd floor) was not working

s) Room 318—bathroom tiles were broken

t) Room 554—(tub room) the knob was off the call bell leaving a sharp edge exposed

u) Room 317—the cord to the overbed light could not be reached by the patient."

Comment: It is my professional opinion that a review of the total operation of the Center indicates substantial compliance with this Regulation. Obviously, the items listed require correction and I am assured by the administrator that maintenance has or will correct all the notations. It would appear to me that while the listings may be appropriate, I have intuitive reaction that they tend to be an "overkill."

37. F420, 421 XR F41, 45

Reg. 405.1134 (j) 405.1121 (g)

"Thermometers were not available on the nursing unit to be able to assure the proper temperature of bath and shower water. There was a strong odor of urine on the 4th and 5th floors and room 206 on the 2nd floor.

"The following unacceptable conditions were observed:

a) the floor in room 508 was sticky and encrusted with food particles.

b) Room 511—a bedpan was stored on the floor under the bedside cabinet and a soiled basin was observed on the floor in the bathroom.

c) Room 309—the cubicle curtain was stained with an unidentifiable substance.

d) Room 417 and 421—had an offensive odor

e) Room 552—paper towels were not available in the bathroom, the water pitcher tray and urinal were soiled with dirt.

f) Room 509—the bathroom sink was dirty

g) Room 517—the bathroom floor was soiled

h) Room 402—the bathroom lacked paper towels

i) Room 450, 451 and 452—the bathroom floors were soiled.

j) Room 412—bedpan was observed on the bedside stand

k) Fourth floor employee bathroom—sink and floor were dirty, stained and ashes were observed in both areas."

Comment: It is my professional opinion that a review of the total operation of the Center indicates substantial compliance with these Regulations. Obviously, the items listed require correction and I am assured by the administrator that maintenance has or will correct all the notations. It would appear to me that while the listings may be appropriate, I have intuitive reaction that they tend to be an "overkill."

40. F457, 459 Reg. 405.1136 (b)

"A fire drill conducted by the survey team revealed the following:

a) Fifth floor—only one aide was available on the old wing, patients were left unattended in the day room with the door closed, no one assumed a charge position and no one assumed responsibility for the retrieval of records.

b) Fourth floor—housekeeping personnel continued to clean, Room 404 the door was held open, patients were left unattended in the lounge, room 409, 413 and no one assumed responsibility for the retrieval of records. The doors to rooms 450, 453, 451, 455 and 459 were left open.

c) Second and third floors—no one assumed responsibility for the retrieval of records."

Comment: During my inspection a fire drill was conducted. While the results of this drill would not indicate a level of proficiency one would expect, it is important to note that ongoing training under the professional aegis of a former Philadelphia fire officer is being conducted. One can anticipate that the disaster preparedness will increase in proficiency as these drills and in-service training continue.

III. Conclusion

After careful review and reflection on the operation of the Town Court Nursing Center, the survey agency report, and a study of the State survey agency's Long Term Care Manual from the U.S.

Department of Health, Education and Welfare, Office of Nursing Home Affairs, it is my opinion that the Order for Decertification is draconian and not supported by the intensity of the cited deficiencies. Further, it would appear that the description of the survey team's function as described in a Long Term Care Manual was not evident in the actions of the agency. I make specific reference to the requirement that the State agency is to make an attempt to upgrade the services, to provide consultation services to the facility, and, generally, to act as consultants to the facility. I can find no evidence that the State agency was involved to the extent as described in the Long Term Care Manual.

Another requirement of the State agency is to make an evaluation as to the willingness and ability of the facility to undertake efforts to correct any deficiencies. Here again, it is my considered opinion that the management of the Center has made a commitment to correct any outstanding problems. This motivation and commitment, as defined in the facility's Plan of Correction, should permit any reasonable person to authorize the time to make said corrections.

I am particularly concerned that the patient population of the Center shall be adversely affected by the Decertification under the Title 18 and Title 19 programs. These patients, in my opinion, are pleased with the accommodations and service. To force them to move to other facilities would be a violation of their constitutional rights. This is particularly so since the listed deficiencies are either incorrect or the State agency has not provided the, "special State documentation in non-compliance cases" as required

by federal guidelines. The deficiencies listed are not of specific nature as to illustrate, ". . . that a patient's health or safety has been endangered by the deficiency or why he believes that it might endanger patients' health and safety." I am further convinced that the public good would better be served by the State agency and the Center taking the steps to mutually resolve problems so that the facility would be in full compliance with all real and imagined regulations. To do otherwise would deprive the patient population of needed services and would be a potential violation of their constitutional rights.

Respectfully submitted,
(s) William J. Jones
William J. Jones

WJJ:DG

PLAINTIFFS' EXHIBIT NO. 7

JOHN E. CUMISKEY, R.N., FACNHA
NURSING HOME CONSULTANT
Marshalls Creek, PA. 18335

June 28, 1977

Mr. Leonard A. Coyle, Esq.
332 W. State Street
Trenton, New Jersey 08608

Dear Mr. Coyle:

In accordance with our conversation and agreement of June 6, 1977, I visited the Town Court Nursing Center in Philadelphia on Tuesday, June 14, and Wednesday, June 15, 1977. As per your request and with the permission of the management, I conducted a peer review survey of this facility on those days.

I was there between the hours of 10 A.M. and 7 P.M. on Tuesday, and from 8 A.M. to 4:30 P.M. on Wednesday, a total of 17½ hours, excepting ½ hour each day for lunch. Incidentally, I had lunch each day at 2 P.M. rather than at noon as I wished to observe the methods of serving and feeding patients on all floors. I was also on all four floors during the hours when the patients were receiving their A.M. and P.M. care. (Bathing, grooming, dressing, undressing, etc.) I also observed the pouring, preparation etc. of medications on all floors. I made continuous rounds during these times, as I wished to see the actual patient care in progress. I also did not wish those personnel administering this care, to be aware of my observation.

As you know, in addition to being a registered nurse, I am a licensed Nursing Home Administrator with 30 years experience. I was also, (among other assignments), a Mess Officer in a 900 bed Station Hospital during World War II. These qualifications, I believe, should give me the competency to render to you the survey report you requested.

For the purpose of clarity, I believe it is best if I refer to these matters by components, as they are outlined in the "Manual of Conditions of Participation". This is, of course, the standard used by the Dept. of H.E.W. for Compliance and Participation in the Nursing Home Program, as administered by the various states.

Leonard A. Coyle, Esq.

Survey: Town Court
Nursing Center

John E. Cumiskey R.N., FACNHA
Nursing Home Consultant
Marshalls Creek, PA 18335

ID PREFIX TAG

Governing Body and Management
F 68 72 73 75 XRF66

In this area I reviewed the corporate records, met the administrators and found all requirements in order. All required documentation of personal policies, employee records as to health certification, employment applications, etc. were as regulations require. Work assignments were available for all personnel.

6. There were available written policies and procedures giving notice to patients, or other responsible

parties, of changes in patient status, charges, billings, etc. and of those charges not covered in the basic per diem rate. A written policy outlining quarterly financial transactions for patients is available. I read this policy and find it most adequate.

Digression:—I am puzzled as to why those statements identified as "A thru J" (under item 6) should be included under "Governing Body and Management". I would think they should come under Nursing Services. However, I will continue to follow the surveyor's outline as they presented it.

6. (cont'd) I observed the total number, (24), of patients in restraint at Town Manor. I found these restraints to be manufactured by the Posey Co. They are of the type known as Vest Restraints, Waist Restraints, and Limb Restraints. These restraints are strictly of the patient protection type; that is, they help prevent the patient from falling out of bed, from a chair, or from doing other damage to themselves viz. (severely scratching, cutting, or bruising themselves, pulling out catheters etc.). I received all of these charts and there were current physicians orders for every one of them.

(a-d)

At no time during my survey (and I must again accentuate that the personnel were not aware of my mission), did I observe any maltreatment of patients by any personnel. I observed a great deal of transporting of patients; from patients rooms to lounges, to the telephones, and to lavatories. Also to tub rooms and showers, to activity rooms, to the main floor, to the group activity room, and finally to the

first floor to physiotherapy. The patient care as it was being given, and the transporting of the patients showed kindliness, gentleness, and concern for the patients comfort, and physical well being.

(e-f)

I checked at random on all four floors at various times of the day on both days I surveyed Town Court. These times were: 10:15 a.m.-11:00 a.m.-12:00 noon-1:00 p.m.- 3:00 p.m.-5:30 p.m.-6:00 p.m.; time approx. each day. The patients I personally checked, and those I observed as I made my rounds showed every evidence of good nursing care. I saw no one with overly long finger nails nor did I see any man in need of a shave. I did, however, notice one woman with a some what excessive growth of hair on her face in a few areas. I suggested to the R.N. in charge on my departure that this lady's physician be consulted as to what procedure to follow in this instance. In my survey of in-service training I found it very strong on patient grooming.

(g.) I examined (with a tongue blade) about 40 patients mouths. Some had complete dentures which were well cared for. Some needed dental care. None had food particles lodged in their teeth or mouths. I was shown documentation that the dental inservice training program has been greatly strengthened, as has been the entire dental care program. A policy is now in force for every patient to have a dental exam by a licensed dentist on admission, and yearly thereafter.

(h.) At no time did I observe any patient inadequately or inappropriately dressed. All presented a nice neat appearance.

(f.) I have reviewed the procedure as outlined and prescribed by the Medical Director for the treatment of Decubiti. In many (in fact in most instances) he prescribes that no dressings be used on Decubiti. In some instances it is recommended that dressings be used, this is noted in the Doctor's Orders and records are entered of the treatment on both the doctors and nurses notes.

I checked 47 incontinent patients at various times in two days. I found four lying or sitting in urine, two were in the process of being changed. In my opinion, the other two patients had just voided very recently. For this number of incontinents, I consider this very remarkable. There are only seven Decubiti in this facility, most of whom came in this condition from other institutions. Out of a census of 186 patients, this bespeaks a very strong performance in this area.

ID PREFIX TAG
NURSING SERVICES
F-128

8. There is in writing, a procedure for cleaning combs and brushes. I reviewed it. It is certainly adequate. Reg. 405.1124 (a)

F-129 133 XRF 181 182

9. I read the assignment sheets now in effect for the 11-7 tour of duty and they reflect the necessary duties to be performed. Reg. 405.1124 (a)

F-169 170 171 172

10. I reviewed a total of 52 charts selected at random (by myself), in all pertinent and required

areas during the two day period of my survey. My review substantiated the following:

(a) All charts reviewed showed activity program evaluations; goals and follow ups were current and pertinent to the patients needs.

(b) As noted previously, in Item 6, subsection (g), dental evaluations and reviews are now being performed and inservice training in this area has been strengthened for all personnel.

(c) This area has been corrected. The charts all show evaluation and patient counseling by the consulting dietitian.

XRF-123 128 134 135 136

(d) I reviewed 35 charts for physicians immediate and long term goals. They were all complete and timely.

(e) I reviewed 52 Nursing Care Plans and found them to be up to date. These plans outlined specific and complete plans of care, as well as short term goals.

(f) Social Service records now show the follow up to reflect social needs. Reg. 405.-1124 (d), (a), (c).

F-173 174 175 176

11. In my rounds, as I noted previously, all patients and I trod every foot of Town Court Nursing Center, showed every evidence of receiving good nursing care. However, I believe it should be borne in mind that many of these patients suffer from one or another of some of the most disabling of the many chronic illnesses. General headings would include

diseases that are Cardiovascular, Nutritional, Cancerous, Arthritic, Neuro-genic, Genito-urinary, or intestinal in origin. This is, of course, not a complete list because it doesn't mention the many complications of these diseases. Nevertheless, it should convey the immense difficulties encountered in giving rehabilitative and restorative nursing to persons with these illnesses.

XRF-123 128 134 135 136 161

(a) I did not see any patient during my survey in poor body positioning or alignment. However, just to mention a few types of diagnosis that could work themselves into poor body alignment and positioning in a matter of seconds I mention to you the following: Hemi-plegics, Para-plegics, Quadra-plegics, Spastics, Multiple Sclerosis, Amyotrophic Sclerosis, Muscular Dystrophy, Arterio Sclerosis and so on ad-infinitum. I think it requires a great and constant effort to try to keep these patients and others in proper alignment and to give them the best possible care in every area. I believe this battle is being successfully waged and constantly reinforced at Town Court Nursing Center.

(b-c)

On checking the procedures for bowel and bladder training, I discovered that this was in force at the time of the inspection. However, this has now been reinforced. Records of this training are kept via a card posted above the patients beds and also by documentation on their charts. Inservice is ongoing and is being reinforced in this area.

(d) Documentation of Range of Motion Exercises for stroke patients and amputees is available on the respective patients charts. Reg 405.1124 (e), (a), (c).

F-177 178 180

12. I observed five meals and checked many charts and I believe nursing personnel are very much aware of the patients nutritional needs.

(a) I observed a great many patients being fed (very patiently), also noted orders for spoon feeding and for pureed foods. I also checked orders for other special diets and found they were carried out.

XRF-123 128 134 135 136

(b) I found documentation of intake and output records on those charts reviewed that called for this information. On investigation, I discovered that the one patient on which this information was lacking was no longer on intake and output. What happened was that the doctor cancelled this order when the patient became well hydrated. Inadvertently, a nurse in transcribing the orders for the current month, carried the order forward, however, it was no longer in force and therefore, was not being carried out. The doctor has attested to this fact via a letter.

(c) At 11:30 A.M., I did not observe any breakfast trays in evidence. However, as it was almost time for lunch, this did not surprise me. I then went to the kitchen to check this item; again no breakfast trays. I inquired of the Food

Manager and was told the breakfast trays were always down and washed long before this time.

(d) I have no comment on this, as I did not observe a similar instance. It is important in this area that supervision and inservice training be continually reinforced to prevent such incidents. Reg. 405.1124 (f), (a), (c).

F-181 182 XRF-123 128 134 135 136 137 279

13. In my observations covering two days, medications were only administered by R.N.'s and licensed Graduate P.N.'s Reg. 405.1124 (g), (a), (c). 405.1127 (d).

14. The medications outlined in the inspection report were all on the medication charts. I checked these charts on all four patient floors, and checked many medications for proper labeling, storage, administration etc. I also checked the emergency medication tray on each floor for proper labeling and content. While I was there I witnessed a three-way check being conducted. All these areas I found to be in good and proper order.

F-186 XRF-346 128 263 264 267 279

15. I found on all 52 charts surveyed that all charting of medications and treatments were as ordered by the physician. Reg. 405.1124 (e), (a), 405.1132 (c), 405.1127 (a), (d).

F-187 XRF-128 279

16. I saw no evidence of any pre-poured medications. All personnel must be made to understand that this is never to be tolerated in any instance. Reg. 405.1124 (g), (a), 405.1127 (d).

F-193 XRF-346 128 279 350 352

17. All verbal orders reviewed were countersigned by the physician within 48 hours. Continued cooperation by the doctors is, of course, very necessary. Reg. 405.1124 (b), (a), 405.1132 (c), (d), 405.1127 (d).

F-203 XRF-128 129

18. I checked out 70 patient's bedside stands and areas and found no medications in evidence. I do however, recommend continued vigilance and emphasis in this area. Reg. 405.1124 (i), (a), 405.-1127 (d)

PATIENT ACTIVITIES

F-330 331

29. I found the patient activities program to be very busy and diversified. I consulted with the full time Director and found her to have a college degree in this area. Activities are carried out in three different physical areas, in a large recreation room on the main floor; inactivity rooms, one situated on each of four patient floors and at the patients bedside. General programs offered are, religious services, arts and crafts, bingo, games, birthday parties, holiday observances, newspaper and public events meetings, appearances by musical groups, play and dancing groups and residential council meetings. My research and observations brought me to the conclusion that a great majority of the patients partake of all or, some of these programs. However, as always some cannot participate because of their physical or mental condition, and there are others who will not participate in anything, regardless of the efforts made to induce them to. It is my opinion that this program is highly successful and is being vigorously carried forward in all areas. Reg. 405.1131 (b)

MEDICAL RECORDS

F 335 344 346 XRF14 73 81 85 521 522

Here again I reviewed 52 patient charts and found that all were current and complete in the following areas.

(a) Patient assessments by physicians and nurses were adequate and up to date.

(b) Discharge planning is a hazy area at best. Although I did find much evidence of this, this represents a medical opinion and as such it is often questionable in cases of chronic illness. Very often it is difficult for a physician to commit himself in this area.

(c) All patient care plans evaluated, reflected good current plans of care, gave the patients status, and the goals to be strived for.

(d) All patient consent forms surveyed were signed by the patient or guardian.

(e) All nursing histories were dated and in good order.

(h) 1-2-3

All nursing summaries on all three shifts were complete on all 52 charts surveyed.

(g) 1-2-3

I reviewed 15 charts in the areas of diagnosis, therapeutics, progress notes, clinical findings etc. I found these to be adequate and informational. Here

again each physician is different in the way he believes this should be done.

Reg. 405.1132 (c)
405.1120 (c)
405.1121 (k), (7), (L)
405.1137 (H)

F 353 354 355 XRF346

31. I did not review any closed medical records. The Operations Officer and the Director of Nursing have told me that these have been audited and are now in good order.

Reg. 405.1132 (e), (c)

PHYSICAL ENVIRONMENT

Town Court Nursing Center is to be commended on the condition of its physical plant and its general all around good housekeeping and cleanliness. The floors were exceptionally clean and shining. All areas were well dusted and ventilated. All the lavatories and tub rooms were clean and neat. I could detect no disagreeable odors in any area.

F 366

32. Electronic call buttons were not present in three patient activity areas. These areas are immediately adjacent to their respective nursing stations. On my visit I observed that tap bells had been installed in each of those areas

Reg. 405.1134

F 388

33. In all hazardous areas, particularly those exit doors leading to elevators and stairways, tape, which

has been sprayed with an abrasive type paint has been installed. The inservice program is being reinforced in this area. Although there are no blind persons in Town Court at present, all personnel are being acquainted with the necessity of indoctrinating patients now and in the future in this most important matter.

Reg. 405.1134 (c), (5.11)

F 389

34. As I read the conditions of participation Audible and Visual Warning Systems are not a present requirement. It is also my understanding Town Court has requested a waiver of this recommendation.

Reg. 405.1134 (c), (5.12)

F 396 397 XRF 36675

35. All patients rooms are equipped with Audio-Visual call systems. All bed patients on my observation had the call button pinned within reach on their bed linen. Those in chairs were positioned so that they could reach the call bell that was resting on top of the bed spread.

In my two days in the facility I did not see one patient's room in which the privacy curtains were not drawn when necessary.

Reg. 405.1134 (e)
405.1121 (K), (9)

Although I was not asked to do so I took it upon myself (since I am inquisitive by nature) to inspect the kitchen area. I found the kitchen, the dishwashing area, and the store rooms to be immaculately

clean and very well organized. All thermometers were in place, and all refrigerators and freezers were exceptionally clean. All foods were properly covered and stored. Their menus are good and the food was well prepared and attractively served. All kitchen rules, schedules, etc., were in order and conspicuously displayed.

I was also most intriqued by the physiotherapy Department. It is very well equipped and there too the housekeeping was very good. I was most impressed by the amount of activity in this Department. I enquired and found that they treat an average sixty-five patients and give sixty-five treatments five days a week. This certainly appeared to be a busy and well run Department.

In conclusion let me say that Town Court Nursing Center is a very well maintained and operated facility. Also I was very favorably impressed with the quality of their staff in all areas.

Very truly yours,
(s) John E. Cumiskey
John E. Cumiskey R.N.,
FACNHA

PLAINTIFFS' EXHIBIT NO. 8

40 Whitehall Road
East Brunswick, N.J. 08816

June 17, 1977

Mr. William J. Jones
752 Fay Street
Elizabeth, N.J. 07202

Dear Bill:

The following is a summary of my inspection of the four nursing stations at the Town Court Nursing Home, conducted on June 13, 1977. My report will be in three sections: General Observations, Specific Observations, and Recommendations.

A. GENERAL OBSERVATIONS

1. Town Court Nursing Home may not be the best in the world, but I have seen many that are a lot worse. The facility is clean; there was no urine odor on any of the floors; most patients were out of their rooms doing something. Each of the nursing stations was clean and orderly; no trash was visible anyplace. Nursing personnel were not just sitting around waiting for something to happen, but were with patients. Patients appeared alert and responded to greetings with warmth.

2. In general, pharmaceutical services could be improved. The Consultant Pharmacist (who is also the provider pharmacist) should spend more time in the facility. The contract between Town Court and

the Consultant Pharmacist stipulates that he will be reimbursed for expenses incurred for supplying reference material. The contract makes no reference to any payment for this time, expertise, or service. I suspect that because he is not being paid he is devoting a minimal amount of time to the facility. A facility of 190 beds requires a full 8 hour day per week of Consultant Pharmacist time (32 hours per month) rather than the 9 to 12 hours per month the Administrator claims the Consultant is giving him.

3. The Consultant Pharmacist quarterly reports (required by Federal regulations) are skimpy and really don't say anything of value.

4. Pharmaceutical policies should be contained in a separate Pharmacy Policies and Procedures Manual. If they must be included in the Nursing Manual they should at least be in one section rather than scattered throughout the Manual.

5. Stop Order Policies in the Nursing Manual are inconsistent.

On page 118:

5 Days—Narcotics and antibiotics

14 Days—Tranquilizers, stimulants, antidepressants

30 Days—All others

On Page 127:

5 Days—Antibiotics

7 Days—Anticoagulants

21 Days—Diuretics

30 Days—Hypnotics

Policy should be uniform and consistent.

B. SPECIFIC OBSERVATIONS

1. *Fifth Floor Nursing Station*

Station was neat and orderly; cabinets and refrigerator were locked as was the medication cart. There was an open box of corn starch, a bottle of *Cepacol* and a bottle of *KetoDiastix* on the counter next to the sink where a patient could get at them.

2. Patient James Morrow

Quinidine not charted at 6 PM and 10 PM on 6/11/77

Thorazine not charted at 6 PM and 10 PM on 6/11/77

Slow-K not charted at 6 PM on 6/8, 6/11, 6/12/77

Lacrilube not charted at 2 AM and 6 AM on 6/10/77

Lacrilube not charted at 6 PM and 10 PM on 6/11/77

Dalmane not charted at 10 PM on 6/5 and 6/11/77

No notations in nurses notes.

3. Clare Snyder

Chlor-Trimeton not charted 10 PM on 6/11/77

No notation in nurses notes.

4. Delphine Taddee

Feosol Spansules not charted at 6 PM on 6/4 & 6/11/77

Entozyme not charted at 6 PM on 6/4 & 6/11/77

Dilantin not charted at 6 PM on 6/11/77

Benadryl not charted at 6 PM & 10 PM on 6/4 & 6/11/77

Meprobamate not charted at 10 PM on 6/4 & 6/11/77

No notations in nurses notes.

5. Rose Frank

Tylenol not charted at 6 PM on 6/11/77

No notation in nurses notes.

6. Donato DePretore

Order reads *Lanoxin;* label says Digoxin.

No current order for *Tylenol* but there was a labeled bottle in the patient's drawer.

7. Amelia Scola

No current order for *Albalon* eye drops but there was a labeled bottle in the patients drawer dated 4/26/77.

8. *Fourth Floor Nursing Station*

A. Station was neat and orderly; everything was locked.

B. Bertha Brown

Order for *Nylmerate Douche* is not listed on Cardex.

C. John Pearson

Nurses notes indicate Kaopectate 30cc. administered 6/7/77.

No order on Physicians Order Sheet; not listed on Cardex.

D. Lela Haywood

Ferrous Sulfate ordered BID, not charted at 6 PM 6/1 through 6/12/77. Only charted at 10 AM.

E. Beatrice Applebaum

Tofranil ordered TID; blocked on Cardex BID; charted 10 AM and 6 PM. *Diamox 125 mg.* also. When I asked the nurse she said she was giving it 3 times a day and she filled in the Cardex.

F. Bertha Weinman

Order for Milk of Magnesia PRN not on Cardex.

At 12:30 PM the 3 PM and Midnight doses of Empirin Compound were already charted.

G. Regina Collins

Tylenol—2 PM dose charted at 12:30 PM.

H. Estelle Jacobs

Rx container of *Ascriptin* dated 3/16/77. Suggest D/C or replacement.

Colace RX dated 3/16/77.

I. Mary Geracitano

Ascorbic Acid RX—soiled label

Tylenol Rx dated 3/7/77 . . . soiled label

J. Mary DeMarco

Sample bottle of Haldol 1 mg., with no Rx label, in patient's drawer.

2 sample bottles of *Haldol Concentrate,* with no Rx labels, in patient's drawer. No physicians order for Concentrate.

K. Cecilia Rubeck

Lanoxin 0.125 mg. ordered every other day, labeled daily.

L. Dirty mortar and pestle in cart drawer.

M. Geneva Stevenson

Container of Aspirin . . . No Rx number or date on label.

N. Beatrice Applebaum

Nitroglycerin 1/150 gr . . . one sealed bottle dated 5/31/77, another sealed bottle dated 7/27/76?

Lable on *Pilocar* should be replaced.

O. Angelina D'Alonzo

Cogentin 1 mg. . . . label inside container. Should be affixed.

9. *Third Floor—Nursing Station*

Station was neat and orderly; everything locked.

A. Mary Lee

1. *Brethine 5mg.* ordered TID; listed on Cardex as TID but only charted 10 AM & 6 PM.
2. *Mellaril 50 mg.* ordered TID on 6/4/77 . . . charted 10 AM & 2 PM from 6/1/77. Not charted at 6 PM until 6/6/77.
3. *Phenergan 12.5 mg.* ordered 6/4/77 . . . not charted until 6/6/77.

B. Berthram Dalzeit

Chloroptic Drops ordered QID; Cardex says QID; charted TID.

C. Minnie Frank

Haldol 1 mg. ordered TID; Cardex says TID . . . charted BID.

D. Paper cups with loose tablets and/or capsules were found in drawers for: John Palo, Charles Pantalone, Clarence Gillard, Noble Green, Arthur Parrish, Berthram Dalzeit, Fannie Strucator, Minnie Frank, Eugene Lawrence, Joseph Meldru, Vincenza Valentino, Angelina Allitto, Catherine McCace, Mary Bauer.

E. External preparations (Anbesol, Hematest) were found in drawers with internal medications for Ferdinand Horle and Trathenia Counts.

F. One patient drawer was labeled for two patients: 358-1 Foster, G. and 358-2 Bauer, Mary.

10. *Second Floor Nursing Station*

Station was neat and orderly and everything was locked.

A. Abraham Carlitz

Order written for "Lax of choice". Order should be specific.

B. Nancy Truitt

Nitroglycerin bottle was corroded indicating the medication had deteriorated.

C. Prescription containers were found with loose labels inside the containers for: Margaret Watkins, Charles Grasso, Abraham Carlitz.

C. SUMMARY AND RECOMMENDATIONS

The quality of pharmaceutical services indicate a lack of supervision by nursing supervisors and/or the Director of Nursing. The charting errors I discovered should have been picked up by the staff long

before I got there. These things also indicate a need for more inspections by the Consultant Pharmacist.

I could not find any records of any in-service trainings conducted by the Consultant Pharmacist. This certainly is a must. In-service training on abbreviations (TID, QID, etc.) might reduce the number of errors.

There were no ancillary label instructions on any prescriptions except two that came from another pharmacy. These ancillary labels are now required.

Emergency kits should be inspected and updated. The list in the nursing manual still includes *Mercuhydrin* which was recalled about 2 years ago.

In summary, the facility has lots of room for improvement but I don't think they are bad enough to be decertified . . . at least not in this area. The Consultant Pharmacist should get on the ball and start doing his job and the facility should start paying him adequately.

Sincerely,

(s) Jesse

Jesse M. Gaynor, RP., M.S.

PLAINTIFFS' EXHIBIT NO. 9

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40 Whitehall Road
East Brunswick, N.J. 08816

July 19, 1977

Mr. Len Coyle
332 West State Street
Trenton, New Jersey 08618

Dear Len:

On July 18, 1977, I revisited the Town Court Nursing Home, at your request, to see what progress had been made on the problems I had found during my first inspection. I am happy to say there has been a tremendous improvement. This change is evidence of the determination of the administration and the staff, to comply with all rules, regulations, and recommendations. The improvement in pharmaceutical services is due, in great measure, to the hiring of an outside Consultant Pharmacist, Robert Larmer, who has considerable experience as a Consultant in long term care facilities. I have always felt the provider pharmacist should not also be the consultant, and the changes Mr. Larmer has been able to bring about are testimony to the validity of the separation of those duties.

This report will follow the layout of my previous report.

A. GENERAL OBSERVATIONS

1. Observations generally the same. The staff is warm and friendly and respond to patients promptly and courteously.

2. Pharmaceutical services have improved drastically. The new Consultant, being paid, will be able to devote the required amount of time to see to it that pharmaceutical services continue to improve and maintain a high quality.

3. It is too soon to see any quarterly reports, but I am confident they will be more meaningful.

4. & 5. A Pharmaceutical Policy and Procedure Manual is being prepared. I was told it should be ready in about 30 days.

B. SPECIFIC OBSERVATIONS

1. *Fifth floor nursing station*

Station was better, but an open bottle of *KetoDiastix* was still at the sink.

All doses charted properly.

B. Clare Snyder

All doses charted properly.

C. Delphine Taddee

All doses charted properly.

D. Rose Frank

All doses charted properly.

E. Donato DePretore

No current order for *Lanoxin* and there was none in the patient's drawer. No order for *Tylenol* and none in the drawer.

F. Amelia Scola

There now is an order for *Albalon* eye drops.

2. *Fourth floor nursing station*

A. Station neat and orderly; everything locked.

B. Bertha Brown

Nylmerate Douche is listed on the Treatment Cardex.

C. John Pearson

There is a physicians order for the *Kaopectate.*

D. Lela Haywood

All doses charted properly.

E. Beatrice Applebaum

Transferred to another floor.

F. Bertha Weirman

Order listed properly under "Laxatives"; all doses charted properly.

G. Regina Collins

All doses charted properly.

H. Estelle Jacobs

New bottle of *Ascriptin* in drawer.

I. Mary Geracitano

Both bottles relabeled.

J. Mary DeMarco

No samples in drawer; all prescription containers are properly labeled.

K. Cecilia Bubeck

Labeled properly.

L. Mortar and pestle were clean.

M. Geneva Stevenson

Labeled properly.

N. Beatrice Applebaum

Transferred to another floor.

O. Angelina D'Alonzo

Label properly affixed to outside of container.

3. *Third floor nursing station*

A., B., & C. All doses charted properly.

D. No loose medications were found in any drawers.

E. No external preparations were found with the oral medications,

F. Patient labeling had been corrected.

4. *Second floor nursing station*

A. Order corrected.

B. Patient just readmitted to facility from hospital. All medications new and in good shape.

C. All labels properly affixed to containers.

C. SUMMARY AND RECOMMENDATIONS

In addition to the patients listed above, I also did a spot check on numerous other patients on each floor. All charts were in order and all prescription containers were properly labeled.

Mr. Larmer is arranging for pharmacy in-service trainings.

There was a definite increase in the number of ancillary labels.

Emergency kits have been updated.

In summary, things looked very good. There were some minor problems such as eye drops being stored with oral medications; more ancillary labels would help; some labels could stand replacing, etc. In general, everything was good.

Sincerely,

(s) Jesse M. Gaynor

Jesse M. Gaynor, R.P., M.S.

PLAINTIFFS' EXHIBIT NO. 10

LEONARD H. FINKELSTEIN, D. O.

Urologic Surgery

Practice Limited To
Urology & Urologic Surgery

2 Bala Cynwyd Plaza Suite 1L20
Bala Cynwyd, Penna. 19004
Tennyson 9-1021

July 12, 1977

Mr. John W. Francks
Executive Director
Geriatric & Medical Centers, Inc.
63rd and Walnut Streets
Philadelphia, Pennsylvania

Re: Town Court Nursing Center
1526 Lombard Street
Phila., Penna. 19146

Dear Mr. Francks:

The above center was inspected by me, at your request as Executive Director of Geriatric & Medical Centers, Inc., on July 9, 1977. The main emphasis of this inspection was quality of patient care.

This was evaluated by direct patient contact, evaluation of random charts (current), direct inspection of environmental conditions, including rooms, bathrooms, shower facilities, hallway and nursing stations. Charts were evaluated regarding the following parameters:

1. Current history and physical examinations;

2. Immediate and future therapeutic goals by physician;

3. Documentation of patient status by physician and nursing personnel;

4. Social Service evaluation including current status and possible future placement to home or lower level care facility.

To accomplish the above, the following was carried out. Every room on all patient floors was personally inspected by me. Brief discussions with seventy-two randomized patients was had regarding their subjective condition. Many more patients were personally observed regarding personal hygiene, including mouth and foot care, state of clothing or gowns, and grooming. Thirty-seven bathrooms were evaluated regarding cleanliness and condition of tile, plumbing facilities, call buttons and protective railings. All shower and tub rooms on each patient floor were evaluated for the same parameters. The recreation rooms on each floor were also evaluated.

The following are my findings:

1. The hallways on the second, third, fourth and fifth floor, as well as the lobby floor, were well lit, in excellent state of repair, with new appearing wall and floor covering. Protective railings on all floors appeared to be in excellent condition.

2. All bathrooms inspected (thirty-seven), were clean. All tile appeared intact and all plumbing appeared in good order.

3. Of the seventy-two patients briefly interviewed, fourteen had vague complaints, compatible with age; none suggesting any serious problem. The remainder appeared satisfied with their condition and did not complain of their environment of the nursing facility when questioned directly regarding this matter. All seventy-two were clean, well groomed and most were ambulatory. Three patients were interviewed with decubiti, all of which were small. All three were out of bed with adequate padding over the area of ulceration. Three patients with indwelling Foley Catheters were observed. Catheters appeared to have been changed recently. Collection bags were below the pubes. No leakage of urine was evident.

4. All rooms were clean, well lit, with air conditioners functional in all but three rooms and fans were running in these. Bedding was clean in all rooms. With few exceptions, all beds were well made. Approximately twelve patients were noted in bedside chairs, restrained in posey restraints. In each case this appeared to be well justified. There was no instance of leg or arm restraint noted.

5. All shower rooms were clean, in excellent state of repair, with adequate protective seating and railings available.

6. Recreational or Television Rooms appeared to be well utilized with functional television sets present and four to six patients noted utilizing these facilities on each floor.

7. Forty charts were reviewed at random.

Fifth-Floor—Fifteen charts were reviewed. Fifteen out of fifteen demonstrated immediate

and future planning. Fifteen out of fifteen showed adequate documentation by nursing personnel. Fourteen out of fifteen showed adequate physician documentation. Fifteen out of fifteen had recent history and physical examinations charted and fifteen out of fifteen had adequate Social Service evaluation.

Fourth Floor—Ten charts were reviewed at random. Ten out of ten contained all parameters reviewed.

Third Floor—Ten charts were reviewed at random. Ten out of ten contained all parameters reviewed.

Second Floor—Five charts were reviewed at random. Five out of five contained all parameters reviewed.

It should be noted that out of one hundred and ninety-eight patients in the nursing facility, only nine patients had indwelling Foley Catheters in place. The remainder were either controlled by diaper or were continent. It is my opinion that if it were possible to carry out urodynamic testing, many of the incontinent patients could be rendered continent and the catheter patients might be rendered catheter free. This, of course, would be a factor to be determined by the attending physicians.

It should also be noted that supervisory personnel were well received by the patient population and appeared to know most patients by name and were familiar with their individual problems.

Foot care appeared to be given regularly, when needed, by a qualified Podiatrist. Although the physical and rehabilitative therapy area was not inspected by me, a large number of patients appeared to be benefiting by these facilities. All non-ambulatory patients should be evaluated routinely regarding rehabilitation, if this is not already your practice.

In summary, a floor by floor, room by room inspection was carried out by me as well as review of forty randomized charts. The thrust of the above inspection was to determine, if possible, the quality of patient care in the Town Court Nursing Center. The above findings indicate to me a well run, efficient nursing facility, practicing an extremely high level of patient care. If any further information is necessary regarding this inspection, please contact this office.

Sincerely,

(s) Leonard H. Finkelstein, D.O.

Leonard H. Finkelstein, D.O., M. Sc.
Clinical Professor of Urology and Chairman, Division of Urology, Philadelphia College of Osteopathic Medicine

LHF/pr

Leonard H. Finkelstein, D.O.
236 David Drive
Havertown, Penna. 19083

Date of Birth: July 16, 1933
Married
Three Children

CURRICULUM VITAE

EDUCATION

Graduated from Philadelphia College of Osteopathic Medicine in 1959.

Intern—Zieger Osteopathic Hospital, Detroit, Michigan in 1959-1960.

Residency in General Surgery—Zieger Osteopathic Hospital, Detroit, Michigan in 1960-1961.

Residency in Urologic Surgery—Hospital of Philadelphia College of Osteopathic Medicine in 1961-1963.

Master of Science Degree—Urology Surgery—Hospital of Philadelphia College of Osteopathic Medicine, 1963.

PROFESSIONAL CAREER

Clinical Professor of Urology, Philadelphia College of Osteopathic Medicine—Appointment July 1977—Continuing.

Associate Professor of Urology, Philadelphia College of Osteopathic Medicine—1970-1977.

Chairman, Division of Urology, Philadelphia College of Osteopathic Medicine—Appointment in 1970—Continuing.

Diplomat (Certified) Urologic Surgery, American Board of Osteopathic Surgeons, 1969.

Chairman, Professional Staff, Hospital of Philadelphia College of Osteopathic Medicine, 1974-1975.

Vice-Chairman, Urologic Section American College of Osteopathic Surgeons, 1973-1974.

Member, Committee on Recruitment, Philadelphia PSRO, 1974-1975.

Member, Board of Trustees of Pennsylvania Osteopathic Medical Association—Appointment in 1970—Continuing.

Chairman, Hospital Peer Review Committee, Pennsylvania Osteopathic Medical Association, Appointment in 1973—Continuing.

Member, Utilization Review Program Evaluation SubCommittee, Philadelphia, PSRO, 1976-1977.

Member, Monitoring Committee of Philadelphia PSRO, 1977.

Member, Insurance Review Committee, Pennsylvania Osteopathic Medical Association—Appointment in 1974—Continuing.

Delegate, Pennsylvania Osteopathic Medical Association, 1970-1977.

Chairman, Utilization Review Committee, Hospital of Philadelphia College of Osteopathic Medicine, 1969-1972.

Commissioner for Delaware County, Pennsylvania Blue Shield, 1962-1975.

Delegate, American Osteopathic Association, 1970-1975.

Council, Comprehensive Health Planning; Taskforce on Health Planning in Pennsylvania, 1973-1976.

Member, Physicians Advisory Committee to Bureau of Comprehensive Health Planning, Board of Health, State of Pennsylvania, 1976.

PAPERS

TransRectal Needle Biopsy of Prostate, Journal American Osteopathic Association, August, 1963.

Circumcaval Ureter, An Uncommon Cause of Obstructive Uropathy, Journal American Osteopathic Association, December, 1972.

Catheter Care and Maintenance, Journal Pennsylvania Osteopathic Medical Association, October 1973.

Urinary Tract Infection and Proper Indwelling Catheter Care, Journal Michigan Osteopathic Association, April, 1974.

Myosarcoma of the Prostate, D.O., April, 1974.

Malacoplakia of the Urinary Bladder, Journal American Osteopathic Association, July, 1974.

Renal Lipsarcoma, Journal American Osteopathic Association, August, 1976.

Vesicoileal Fistula: An Unusual Complication Following the Use of Formalin for Control of Refractory Post-Irradiation Bladder Hemorrhage, Journal of Urology, February, 1977.

Office Urologic Problems, Part I, Scrotal Masses, Osteopathic Medicine, March, 1977.

Office Urologic Problems, Part II, Recurrent Urinary Track Infections in Females, Osteopathic Medicine, April, 1977.

SPEAKER

American College of Osteopathic Surgeons, Urologic Section, 1963, 1964, 1966, 1967, 1969, 1970, 1971, 1973, 1974, 1976.

Urologic Seminar, Philadelphia College of Osteopathic Medicine (Speaker and Moderator), 1974, 1975, 1976.

American College of Osteopathic Physicians, November, 1975; West Virginia Osteopathic Physicians, May, 1976, *"Chronic Urinary Tract Infection."*

American College of General Practitioners, New York, N.Y., July, 1976, *"Urologic Office Problems."*

SCIENTIFIC EXHIBITS

TransRectal Needle Biopsy of Prostate, American College of Osteopathic Surgeons, 1963.

Catheter Care and Maintenance, American College of Osteopathic Surgeons, 1973.

Visual Aids in Endoscopic Urology, American College of Osteopathic Surgeons and American Osteopathic Association, October, 1975 and November, 1975.

AWARDS

Lindback-Christian Award for Distinguished Teaching, 1970; Christian, R. and Mary F. Lindback Foundation Award, June 7, 1970.

PLAINTIFFS' EXHIBIT NO. 11

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania 19101

Office of the
Regional Director
Mailing Address
P.O. Box 13716
Philadelphia
Pennsylvania 19101

July 19, 1976

Our Reference: OLTC (19) ew
Towncourt Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146
Provider No. 39-5337

Gentlemen:

This is to notify you that our letter of May 11, 1976 regarding your initial certification in the Medicare Program *was in error regarding the effective date and term of your agreement.* The Supplement had indicated that the effective date of your agreement was September 3, 1975 and that its term would be from September 3, 1975 through September 30, 1976, with an automatic cancellation date of July 31, 1976.

The Supplement to your agreement should have stated that the effective date of your agreement is *April*

14, 1976. The correct term of your agreement is April 14, 1976 through April 30, 1977 with an automatic cancellation date of July 31, 1976.

April 14, 1976 is the earliest possible effective date for your agreement. On that date a survey was performed which found you had corrected all the deficiencies which had caused the involuntary termination of your facility, which took effect October 31, 1974.

Surveys prior to the April 14, 1976 survey found that the deficiencies which had caused your termination from the program had not yet been fully corrected. Section 1866 (c) (1) of the Social Security Act and Regulation 20 CFR 405.616 precluded your readmission to the program until the reason for your termination had been removed.

Enclosed is a corrected copy of the Supplement to your Agreement.

Sincerely yours,

(s) Robert J. Taylor
Robert J. Taylor, Director
Office of Long Term Care
Standards Enforcement

Enclosure

DEFENDANTS' EXHIBIT NO. 1

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
Harrisburg, Pennsylvania 17120

May 26, 1977

Office of
Medical Programs
Mr. Donald Lewis
Administrator

Town Court Nursing Center, Inc.
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Dear Mr. Lewis:

A medical review follow-up visit was made to your facility on May 9, 10, and 11, 1977.

The purpose of this visit was to review the actions taken to correct deficiencies as well as to review the care being provided Medical Assistance patients.

Enclosed is a summary report of the findings as discussed with you in the exit interview. If you have any questions, please contact us.

Sincerely,

(s) Roger A. Cutt
Roger A. Cutt, Ph.D.
Commissioner for
Medical Programs

Enclosure

5-19-77

TOWN COURT NURSING HOME
Medical Review
Follow-up Survey

The Code of Federal Regulations 45, Section 250.23, provides for medical review, including medical evaluation, of the need for care in such a facility, a written plan of care, and, when applicable, a plan of rehabilition for patients certified eligible for Medical Assistance and admitted to a skilled nursing facility: At least one inspection must be made annually, however, more frequent reviews may be based on the quality of care being rendered and the conditions of the Medical Assistance patients.

The medical review inspection includes personal contact with and observation of each Medical Assistance patient. Such review and observations are to determine the adequacy of the services available to meet their current health needs and promote the optimal physical, mental, and psychosocial functioning of the patients, the necessity and desirability of the continued placement of the Medical Assistance patient in the facility, and the feasibility of meeting their health needs through alternative institutional or non-institutional services.

Follow-up visits are made to the skilled nursing facility for correction of deficiencies found during the annual review to determine whether the facility has corrected such deficiencies in accordance with the facility's written time limited plan of correction.

Attached is a copy of the medical review final report dated February 7, 1977, following a survey conducted on December 14, 15, 16, and 17, 1976.

The follow-up survey conducted on May 9, 10, and 11, 1977, was not limited to the deficiencies reflected in the medical review final report. The total patient census for Town Court on the day of the visit was 179, 9 private patients and 170 Medical Assistance patients. Each Medical Assistance patient's clinical record was reviewed and each patient was observed and interviewed with and without staff present.

As a result of this visit, the following observations were made:

1. The admission sheet should identify whether the patient is an initial admission or readmission.

2. The diagnosis on the patient's record was incomplete.

Medications for specific medical conditions were ordered and given to the patient, however, the specific medical condition was not included in the diagnosis. Several patients were single or multiple amputees, however, the medical condition requiring the amputation was not included in the diagnosis.

3. The sixty (60) day recertification of continued medical necessity for skilled nursing care is incomplete and many are not signed by the attending physician.

The attending physician is to document and sign a progress note at least *every sixty days.* The note shall contain specific medical and/or physical conditions and the need for continued services on an inpatient basis.

4. Nurses' notes do not include documentation of follow-up for acute conditions, i.e., elevated temperature, diarrhea, nausea, and vomiting.

The acute condition is recorded, however, you cannot determine from the notes whether the condition has improved or is no longer present.

5. Attending physicians are not dating and signing monthly orders.

We did obtain a copy of the form letter notifying the attending physician of the requirement for a visit at least every thirty (30) days.

6. An Incident/Accident Report is not being completed for patient incidents involving staff or patients who have fallen with a nurses' note recording "with no apparent injury".

In addition, the Incident/Accident Report does not include a section for dating and documentation by the attending physician following examination of the patient. A copy of the Incident/Accident Report shall be placed in the patients current medical record.

7. Since a dental consultant is available, we suggest that each patient have a dental evaluation.

In addition, the dental consultant should be scheduled for an inservice program addressing daily oral hygiene.

8. Licensed personnel are to be instructed in pouring and giving medications.

Recording in the nurses' notes stated medications were borrowed from another patient's room. The consulting pharmacist should hold a scheduled inservice program for staff on the correct method of administering medications.

We are requesting that the facility submit a written plan of correction within thirty (30) days from the

date of the letter, of corrective action taken as a result of the findings.

The following positive actions have been taken by the corporation and facility to improve the physical plant as well as the quality of patient care.

1. Nursing Service—A new Director of Nursing was hired September 1, 1976, Mrs. B. Sterner, R.N., formerly employed as Director in the Baptist Home.

2. Only three (3) of the presently employed licensed nursing personnel, which total 29, were hired prior to January 28, 1976. The Director of Nursing is presently evaluating all employees' capabilities for providing nursing services commensurate with the individual patient's needs. Several employees have been suspended or have voluntarily resigned.

3. Decubiti (open pressure sores) are recorded on eight (8) patient records as healing. Those observed on bed patients were clean, dry, and healing.

4. Scheduled activities have increased as well as activities for room-bound patients. Twenty (20) patients were observed attending a scheduled program on the first floor.

5. An inservice program was held for all staff on safety measures and prevention of patient injuries.

6. A telephone plug-in monitoring system has been installed for heart pacemakers. Five (5) patients presently have pacemakers.

7. The facility has a very active Physical Therapy Program. Forty (40) patients are ordered physical

therapy. A total of 48 patients are hemiplegias, bilateral amputees, or single amputees.

8. All carpeting has been removed from patient rooms and replaced with lineoleum.

9. A larger ice making machine is being installed as requested by the Department of Health surveyor.

10. New mattresses and pillows have been or are being purchased for all of the beds in the original building.

11. Many patients were observed wearing slippers which could result in ankle edema, however, a shoe company representative is presently in the process of fitting patients with shoes treated with preservatives to prevent the absorption of urine. One patient was observed wearing new shoes.

12. Two records of expired patients were reviewed. Both patients were transferred to the hospital, one with a diagnosis of myocardial infarction, one for a bilateral inguinal herniorraphy; both hospital admissions are considered to be justifiable and customary medical practice.

The staff recently employed could continue to improve administration and health care standards if the corporation were required to submit a written agreement stating that the administrative staff presently employed receive tenure with continued support for improving services and the image of the facility.

This facility's past history of continual changeover in administration is not conducive to stability of performance or ability to provide acceptable services.

Source of Admissions to Town Court Nursing Home

Graduate Hospital	31
Hahnemann	6
Einstein (North)	5
(SE)	3
Germantown Hospital	2
Philadelphia VA	5
Presbyterian	13
PA Hospital	6
Parkview	5
University of Pennsylvania	1
Philadelphia Psychiatric	2
Moss Rehab	3
Lankenau	1
Episcopal	1
Temple	4
Philadelphia General	2
Medical College of PA	1
Memorial	1
Methodist	2
St. Joseph	1
St. Agnes	10
Center City	2
West Park	1
Metropolitan	2
Osteopathic	1
All Saints	2
Jefferson	4
Nazareth	1
Home	16
Nursing Homes	36

DEFENDANTS' EXHIBIT NO. 2

THE TOWN COURT
NURSING CENTER
1526 Lombard Street
Philadelphia, Pa. 19146
215 KI 6-5960

June 23, 1977

Roger A. Cutt, Ph.D.
Commissioner for Medical Programs
Commonwealth of Pennsylvania
Department of Public Welfare
Harrisburg, PA 17120

Dear Mr. Cutt:

As per your request we are hereby submitting our plan of correction for actions which have taken place or will take place as a result of the finding of the Medical Review follow-up visit of May 9, 10 and 11, 1977.

1. *The admission sheet should identify whether the patient is an initial admission or readmission.*

This is a good suggestion—We will note this on our admission form.

2. *The diagnosis on the patients' record was incomplete.*

Medical Records are being closely monitored by Nursing Administration to insure complete diagnosis' Inservice Program.

3. *The sixty (60) day recertification of continued medical necessity for skilled nursing care is incomplete and many are not signed by attending physician.*

This has been corrected and ongoing inservice will be continued.

4. *Nurses' notes do not include documentation of follow-up for acute conditions, i.e., elevated temperature, diarrhea, nausea and vomiting.*

Continued monitoring and inservice by Nursing Administration will insure the continued upgrading of nurses notes.

5. *Attending physicians are not dating and signing monthly orders.*

Doctors will continue to be notified of this requirement as necessary.

6. *An Incident/Accident Report is not being completed for patient incidents involving staff or patients who have fallen with a nurses' note recording "with no apparent injury". In addition, the Incident/Accident Report does not include a section for dating and documentation by the attending physician following examination of the patient. A copy of the Incident/Accident Report shall be placed in the patients current medical record.*

Attending physicians documentation on Incidents and Accidents is recorded on physicians progress notes. All incidents and accidents will be reported. The Medical Director Consultant reviews all Incident/Accident Reports, signs and dates them. A permanent file is kept for all Incident/Accident Reports.

7. *Since a dental consultant is available, we suggest that each patient have a dental evaluation. In addition, the dental consultant should be scheduled for an inservice program addressing daily oral hygiene.*

The dentist has started and will continue to give dental evaluations on each of our patients. A dental inservice was given by Dr. Berkowitz on 6/1/77.

8. *Licensed personnel are to be instructed in pouring and giving medications. Recording in the nurses' notes stated medications were borrowed from another patient's room. The consulting pharmacist should hold a scheduled inservice program for staff on the correct method of administering medications.*

The consulting pharmacist held an inservice on 6/7/77 regarding the proper administration of medications. Inservices and monitoring by both the pharmacist and by nursing administration will continue improvement in this area.

I would like to thank the survey team for their cooperative attitude and constructive suggestions during the survey. If there are any questions regarding this reply, please do not hesitate to contact me.

Thank you.

Sincerely,

(s) Donald B. Lewis
Donald B. Lewis NHA
Administrator

DBL: pah

DEFENDANTS' EXHIBIT NO. 3

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE

Harrisburg, Pennsylvania 17120

February 7, 1977

Office of
Medical Programs
Mr. John Holbrook
Administrator

Town Court Nursing Center, Inc.
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Dear Mr. Holbrook:

A medical review of Medical Assistance patients was conducted by the Departmental Medical Review Team on December 14, 15, 16 and 17, 1976.

The Medical Review Team's observations, findings, and recommendations, based on professional judgment and current Federal and Long Term Care Standards and Regulations, are contained in this report. The findings and recommendations are concerned specifically and exclusively with an evaluation of the care needed, the care being provided, the adequacy of the services available to meet the current health needs, and the feasibility of providing alternate institutional or noninstitutional services as needed.

Copies of this evaluation and recommendations are being forwarded to the County Board of Assistance and the Department of Health Regional Office.

Deficiencies found by the Medical Review Team, on which remedial or corrective action is indicated

and recommended, are noted on the attached summary. Major deficiencies were discussed with you at the conclusion of the visit. It is requested that you inform us within thirty days of remedial or corrective actions taken, or changes in procedures instituted, with respect to any or all deficiencies cited. If you have any questions on the substance of this report, or if we can be of any assistance in regard to effecting indicated improvements, please contact us.

Medical Assistance patients reviewed: 160 (includes 2 patients in appeal status)

Medical Assistance patients recommended for alternative care: 3

1. Complete X
2. Current X
3. Physician recommendation for admission or M.A. benefits X

CARE PLAN

1. Available on admission or on application for M.A. benefits X Some not available on admission.
2. Diagnosis (es) complete and current X
3. Symptoms, complications, functional level stated X Some are not documented.
4. Treatment objectives (goals) X
5. Physician medication orders (30-day) X

A. Appropriate tests regarding medication regimen X

B. Tests reports available Several not available; some are delayed and/or not to patients' charts.

C. Medications properly recorded Should be dated when signed by the physician.

6. Physician treatment orders (30-day) X

A. Treatments properly recorded X

7. Restorative or rehabilitative services ordered X

A. Prescribed services recorded X Several lack progress notes by physiotherapist.

8. Therapies ordered X

A. Prescribed therapies recorded X Lack progress notes by speech therapist.

9. Activities ordered New intensive program instituted.

10. Social Services X Good notes.

11. Diet X

12. Health and Safety Measures Lack physician's order for restraints on Elizabeth Poller, Rose Frank and Bessie Walker.

13. Progress notes current:

A. Physician X However, some lack documentation of symptoms and complications.

B. Nurse X Several lack activities and unusual happenings.

C. Other disciplines X Several therapists notes are lacking.

Personnel responsible for recapping physician's orders should sign the order sheet.

. . . physical recertification . . . need (60-day) X Many lack documentation.

. . . for continuing care reviewed . . . revised (as necessary) X Some lack evidence of needed revision.

Individual discharge plans X

EVALUATION OF SERVICES

Cleanliness (patient, surroundings) X However, nail care could be improved.

Decubiti Some noted—being treated.

Signs of malnutrition/dehydration X

Maintenance of optimal:

A. Physical function X

B. Mental function X

C. Psychosocial function Increased social involvement of non-ambulatory patients should be encouraged.

Required services available X

Required services being furnished X

Accessibility to special services and/or consultants X

Evidence that nursing services are being provided as documented Several medication irregularities discussed and will be corrected.

Staffing adequate (at time of visit) X

Physician services provided as needed X

Availability of emergency physician in attending physicians' absence X

Evidence of patients' satisfaction with care received X

Evidence of on-going patient evaluation per Utilization Review X

Facility cooperation in all aspects of Medical Review X

REMARKS

A need for improved safety measures is indicated since incidences of falls and injuries to patients are so numerous.

The general observation on facility operations is that the patients appear to be receiving adequate medical and nursing care.

As a result of this visit, the following recommendations are being made:

1. The patient's attending physician has the responsibility for recertification at least every 60 days as to the patient's continuing need for skilled nursing facility services. This information is to be documented by the physician on the progress report contained in the patient's chart. (Memo 68)

2. The plan of care shall include diagnosis, symptoms, complaints, and/or complications indicating the need for admission, a description of the functional level of the patient; written objectives; orders (as appropriate) for medications, treatments, restorative and rehabilitative services, therapies, activities, social services, diet, and special procedures recommended for health and safety of the patient; and plans for continuing care (including provisions for review and necessary modification of the plan) and discharge.

3. Physician's documentation is lacking on the following patients' charts:

Vincent Cataldi—progress notes make no mention of seizures on 8-23-76.

James Darrah—no follow-up on fall suffered 10-4-76 or episode of dyspnea 11-27-76.

Michael Veasey—treatment order of 12-11-76 does not specify what treatment is for.

Hugh Falls—L-Dope 250 mgm qid; however, no diagnosis of Parkinsonism or other reason given for order.

Ella Haywood—Post-op bowel resection; date and reason for surgery not documented.

Dock Tribble—repeated orders and discontinuances for physical therapy on chart; no documentation that physical therapy was given.

Russell Daub—coronary insufficiency; no ECG on chart.

Hugh Boyle—ECG in September 1976—interpreter suggests repeat of AVF; not completed.

Margaret Fletcher—skull x-ray; no reason given.

Gertrude Foster—ECG order 5-11-76—no documentation of being done—not reordered; B.P. progressively elevating—however no physician documentation concerning this problem or his intention.

Blanche Weiss—rapid weight changes monthly—132/154/134/136/154/118; deserves mention if accurately recorded.

James Darrah—Nurses notes in November 1976, indicate episodes of distress; no physician's progress notes.

4. The following patients' charts lack incident/accident reports, documentation of physician's notification and/or completion of the report by the physician. They are:

Margaret Allen—fell 7-76, report not completed by physician.

William Dee—fell 7-76, no report; 10-76, report not completed by physician.

Lillie Burtis—fell 9-76, no report.

Blanche Weiss—fell 5-76, no report or documentation that physician was notified.

Amelia Scola—fell 10-76, report not completed by physician.

Mary Geracetano—fell 9-76 and 11-76, no reports.

Bessie Walker—fell 4-76, no report.

Lena Bieber—fell 9-76, no report or x-ray report on chart.

John Pierson—fell 7-76, no report.

James Mullen—fell 8-76, 9-17, 20, 22-76, 11-3-76, no report and no documentation that physician was notified; fell 11-21-76, no report.

Rose Frank—fell 7-76, physician was notified, no safety measures ordered; fell 8-76, no documentation that physician was notified.

Fannie Blum—fell 4-76 and 8-76; no documentation of physician's notification, no physician's notes.

Bertha Brown—fell 10-76, no report on chart.

5. Since specialty consultants are available to your facility, the following consultations are being recommended:

Robert Houston, 1221895-TJ—speech therapy

Laura Stetzer, 1075715-TA—speech therapy

Angelina Bolger, 787830-TA—eye consultation

Bertram Delzeit, 1058676-TA—eye consultation

Marie Weineth, 476332-TA—eye consultation

Catherine Walters, 1078477-TA—psychiatric consultation

Isaiah Sobel, 1064880-TA—phychiatric consultation

Mary Lee, 1176390-TA—psychiatric consultation

Arnold Phillips, 1173523-TA—physical therapy

Dock Tribble, 1141748-TA—physical therapy

Donto DePretare, 1237860-TA—dental consultation

placement:

Sarah Bugash—1219874-TA
Margaret Roll—410562-TJ
Alfred Jackson—1248079-TA

A written response as to remedial or corrective actions to be taken or changes in procedures instituted with respect to the above recommendations is required within thirty days of this report.

A second copy of this final report is enclosed and should be given to the Chairman of your Utilization Review Committee.

If you do not agree with the Medical Review Team's recommendations for medical and nursing services, a written letter of appeal should be submitted within thirty days of the date of this letter.

Sincerely,

Roger A. Cutt, Ph.D.
Commissioner for
Medical Programs

Enclosure
cc: Mr. Laff

Philadelphia CBA—Att. Mr. Duress
Southeastern Region—Att: Mrs. Poppert
Norristown State Hospital

. . . .

TOWN COURT NURSING CENTER
1526 Lombard Street
Phila., Pa. 19146

February 28, 1977

Rodger Cutt, Ph.D.
Commissioner for Medical Programs
Office of Medical Affairs
Commonwealth of Pennsylvania
Department of Public Welfare
Harrisburg, Pa. 17120

re: Medical Review of MA
Patients 12/14, 15, 16, 17, 76

Dear Sir:

Following you will find the course of action taken pertaining to the communication received from your agency regarding December 14, 15, 16, 17, 1976 medical review of MA patients at Town Court.

1. In effect—December 1976.
2. Completed and in effect—January 1, 1977.
3. Corrected through Medical Direction Consultant Committee—see enclosed.
4. Corrected through on going in service and current medical evaluation studies.
5. All recommended consultations have been ordered and completed.—See enclosed.

Following find the action to be taken on patients being recommended for intermediate nursing care placement.

Sarah Bugash—1219874-TA—under appeal.

Alfred Jackson—1248079-TA—under appeal.

Margaret Roll—410562-TJ—to be transferred to ICF.

If there are more questions please feel free to contact me at Town Court Nursing Center.

Very truly yours,

(s) Donald Lewis
Donald Lewis, NHA
Administrator

ss
Enclosures

U-4

Form Approved. OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION

PROVIDER NUMBER (X1): Vendor #01,00357 39-5337

FACILITY: Town Court Nursing Center

DATE SURVEY COMPLETED (X2): 3/8, 9, 10, 11/77

STREET ADDRESS, CITY, STATE, ZIP CODE: 1526 Lombard Street, Philadelphia, Pa. 19146

NOTE: This document contains a listing of the deficiencies cited by the surveying State Agency as requiring correction. This Summary Statement of Deficiencies is based on the surveyor's professional knowledge and interpretation of Medicare and/or Medicaid requirements. In the column Provider's Plan of Correction, the statements should reflect the facility's plan for corrective action and anticipated time for correction. Copies of this form will be kept on file at local Social Security and Public Assistance Offices, to be made available to the public, upon request.

(X3) SUMMARY STATEMENT OF DEFICIENCIES NOTED BY SURVEYING STATE AGENCY WITH REFERENCE CITATION	(X4) PROVIDER'S PLAN OF CORRECTION WITH TIME TABLE
Conformity with Federal, State and Local Laws 1. The written agreement with the Intermediate Care Facility has expired. F 14 Reg. 405.1120(c) 2. Two (2) Medical records reviewed lacked documentation of yearly blood and urinalysis reports. F 14 Reg. 405.1120 (c) Governing Body and Management 3. The governing body and administrator are not enforcing rules and regulations relative to the health care and safety as evidenced by lack of supervision of physician's services, nursing services and medical records. F15 XRF19 23 25 27 28 62 64 Reg. 405.1121 (c), (e), (k)	APR 18 1977 1. A written agreement was signed with Ivyridge Nursing and Conv. Home an Intermediate Care facility, on 3/16/77. 2. Existing policies and procedures are being reviewed and reinforced. Inservice training is being conducted on an ongoing basis. Thorough auditing and supervision will insure that the problem will be corrected by 5/31/77. 3. Through regular meeting with staff; ongoing dialog with the Medical Director Consultant, Administrator, and Director of Nursing; clearly outlining areas of responsibility; frequent audits and constant follow up this situation will be corrected by 4/30/77.

PROVIDER REPRESENTATIVE'S SIGNATURE: Ronald B. Lewis NHA — DATE (X5): 4/14/77

*Any deficiency statement ending with an asterisk (*) denotes a condition which the institution may be excused from correcting provided it is determined that other safeguards provide sufficient protection to the patients. The asterisk means that the surveying State Agency has recommended that the deficiency be waived for this reason. If the State Agency recommendation has been accepted, this will be noted in the right hand column opposite the deficiency statement.

FORM SSA-2567 (11-74) — 1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE — PAGE 1 OF ____

Form Approved OMB No. 72-R0931

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER: Vendor #01,00357 39-5337

(X2) MULTIPLE CONSTRUCTION: A. BUILDING _____ B. WING _____

(X3) DATE SURVEY COMPLETED: 3/8, 9, 10, 11/77

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
F41 47	Governing Body and Management (continued) 4. The facility is not complying with it's policy to have completed annual physical examinations and chest x-ray or mantoux tests on all employees. This is evidenced by: a) lack of documentation of mantoux tests or x-ray findings on twenty-two (22) out of sixty-seven (67) employee health records reviewed. b) physical examination results were lacking on two (2) out of sixty-seven employee health records reviewed. Reg. 405.1121 (e)		4. The Medical Direction Consultant Committee has reviewed the policy and procedures and has established the following: All employees are required to have a pre-employment physical examination including a Chest X-ray or Mantoux and an annual physical examination not requiring an X-ray or Mantoux except in the case of Dietary employees whose annual physical exam will require a Chest X-ray or Mantoux. Regular audits will be conducted to insure that this policy is conformed with. Correction will be completed by	5/31/77
F48 51	5. Documentation that inservice education programs were conducted for confidentiality of patient information and accident prevention was not available for review. Reg. 405.1121 (h)		5. Inservice on confidentiality of patient information was conducted on 12/27/76 and is documented. Further inservice training is to be held. Ongoing inservices regarding accident prevention are to be conducted by	5/31/77

Page 2 of ____

FORM SSA-2567A (11-75) — 1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
Vendor #01,00357 39-5337	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
P68 72 73 75 XRF66	Governing Body and Management (cont'd) 6. Procedures have not been developed, in writing to inform patients of related charges and charges not covered under titles XVIII and XIX or charges not covered in the basic per diem rate. Documentation that patients are given a quarterly accounting of financial transactions was not available for review. Three (3) patients who were observed in restraints did not have a physician's order for the restraint. The following unacceptable situations were observed: a) an aide was observed bathing a patient, while the surveyors were present, with the patient completely exposed. b) a patient was observed being pulled through the corridor (5th floor) clothed in only a bathrobe which was on backwards. The patient was exposed. c) One (1) female patient was observed being pushed in a wheelchair to the bathroom without footwear. Care was not taken to protect the patient's feet causing one foot to jam into the door.		6. Written policy and procedure has been developed to inform patients of all charges not covered in the basic per diem rate. Written policy is being developed regarding quarterly accounting of financial transactions. Will be corrected thru ongoing In-service training programs and delegating responsibility for physicians orders for use of restraints to nursing supervisors. Items 6. A thru J will be corrected thru ongoing inservice training and delegating responsibility of follow-up to nursing supervisors with monitoring by D.O.N., Asst. D.O.N., and Facility Administrator.	11/18/76 5/31/77 6/30/77 5/31/77 5/31/77

NOV 18 1977
CARE

FORM SSA-2567A (11-75) I. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE Page ___ of ___

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor #01,00357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
	Governing Body and Management (cont'd) d) Two (2) patients were observed being pushed and pulled, by the same person. This caused one patient to be pulled beckwards. e) Twenty-one (21) patients plus the patients in the 4th and 5th floor lounges were observed with excessively long, dirty and/or unmanicured fingernails. f) Nine (9) male patients were observed in need of a shave, as evidenced by excessive growth of beard. g) Eighteen (18) patients were observed with poor oral hygiene (i.e. food particles in teeth and/or dentures, teeth missing, food particles on mouth, lips and gums). h) Thirty-three (33) patients plus patients in the 3rd and 4th floor lounges were observed inappropriately dressed (i.e. no underwear, no shoes or socks, dispered with a towel, stained or torn clothes) i) a patient in room 510 was observed lying on her decubiti ulcer (with no dressing) in cold urine. Approximately five (5) patients were observed lying or sitting in urine.		See response on page #3	

11/18/76
NOV 18 1977
CARE

FORM SSA-2567A (11-75) I. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE Page 4 of ___

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor 0400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

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	Governing Body and Management (cont'd)			
	j) A patient was observed in room 514 with what appeared to be vomitous on his on his face, shoulder and bed.		See response on page #3 ↓	
	Reg. 405.1121 (k)(2),(6),(7),(9)			
	Physician Services			
F101 102 103 104 105 106 107 109 110 111 112	Individualized rehabilitative potential of the patient was not available on forty-five (45) out of forty-five (45) medical records reviewed. Specific immediate and long term goals to meet the individual needs of the patient were not available on forty-five (45) out of forty-five (45) medical records reviewed.		Use of new forms which include individualized rehabilatative potential of patient has been approved by the Medical Direction Consultant Committee. Medical Direction Consultant Committee is to establish policy and procedure for recording specific immediate and long term goals to meet the individual needs of the patient.	6/30/77 5/31/77
YRF169 170 171 172 346 14 90 94 96	Nine (9) current medical records reviewed locked admission history and/or physical examination by the physician. Nine (9) out of forty-five (45) medical records reviewed lacked a progress note written at the time of each physician visit.		Medical Director Consultant will contact physicians by letter informing them of their responsibility regarding a. Admission History and physicals and b. progress notes to be written at time of each physician's visit.	5/31/77

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 5 of _____

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor 0400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

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	Physician Services - cont'd			
	Reg. 405.1123 (a),(b) 405.1124 (d) 405.1132 (c) 405.1120 (c) 405.1122 (a)			
	Nursing Services			
F128	8. A written procedure for cleaning combs and brushes was not available for review. Reg. 405.1124 (a)		8. Procedure already in effect has been put down in writing.	4/15/77
F129 133 YRF181 182	9. Assignment sheets were not available for the 11-7 tour of duty. Reg. 405.1124 (b)(g)		9. Assignment sheets are now being completed for the 11-7 tour of duty corrected at time of survey.	3/11/77
F169 170 171 172	10. Documentation on the patient plan of care is inadequate as evidenced by the following: a) Thirty-two (32) out of forty-five(45) current records reviewed lacked activity program evaluation, goals and/or follow-up. b) Forty-five (45) out of forty-five (45) current records reviewed lacked dental evaluation and/or follow-up.		10. a. Approved full-time recreation director is in the process of completing activity program evaluations, goals, and follow ups. b. Dental Inservice for Nursing personnel scheduled for May 4,1977. As a result, nursing staff will be capable of informing doctors of	5/31/77 5/31/77

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 6 of _____

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor 0400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

406a

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
	Nursing Services - cont'd		patient's dental needs.	
XRF123 128 134 135 136	c) Twenty-eight (28) out of forty-five (45) current records reviewed lacked evaluation and/or patient counseling by the dietitian.		c. Dietary consultant is in the process of reviewing and evaluating patient's dietary needs.	5/31/77
	d) Forty-five (45) out of forty-five (45) current records reviewed la lacked specific immediate and long term goals by the physician.		d. answered in item #7, paragraph #2.	
	e) Twenty-seven (27) out of forty-five (45) current records reviewed lacked specific and/or complete nursing plans of care.		e. Monitored and corrected by Nursing supervisors. Continued monitoring and auditing to be conducted by D.O.N. and Asst. D.O.N.	4/30/77
	f) Eighteen (18) out of forty-five (45) current records reviewed lacked follow-up to identify social needs.		f. Full-time approved Social Service Worker is reviewing all patient's records to identify social needs.	5/31/77
	Reg. 405.1124(d), (a), (c)			
F1 73 174 175 176	11. Rehabilitative and restorative nursing is not being provided in accordance with the individual needs of the patients as evidenced by:		11.	10446
XRF123 128 134 135 136 161	a) patients who were in bed or in chairs were maintained in poor body alignment and positioning. b) documentation of bowel and bladder training program being		a.-c. To be corrected by ongoing Inservice training and reinforcement by Nursing supervisory personnel.	5/31/77

FORM SSA-2567A (11-75) — I. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE — Page 7 of _____

Defendants' Exhibit No. 4

323

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor 0400357	A. BUILDING _____ B. WING _____	3/8, 9, 10,

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
	Nursing Services - cont'd			10446
	followed was lacking. c) Forty-seven (47) patients who are incontinent of bowel and/or bladder are not on individualized program for training.			
	d) lack of documentation by nursing personnel of range of motion exercises given to or stroke patients and amputees.		d. Documentation of regularly scheduled exercises has been implemented.	5/31/77
	Reg. 405.1124 (e),(a),(c)			
F177 178 180	12. Nursing personnel are not aware of the nutritional needs of the patients as evidenced by the following:		12.	
XRF123 128 134 135 136	a) Two (2) patients who had a physician's order to be fed were observed eating unattended. b) lack of documentation of fluid intake for patients who had physician's orders to force fluids. c) Two (2) breakfast trays were observed at 11:30 am with only beverages consumed. Nursing personnel were unaware of who the trays belonged to d) One patient was ordered by the physician to receive eight (8) ounces of water with the meal, which was not provided.		a.-d. To be corrected thru ongoing inservice training and delegation of responsibility for these areas to Nursing Supervisors. Problems to be corrected by.....	5/31/77
	Reg. 405.1124 (f), (a),(c)			

FORM SSA-2567A (11-75) — I. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE — Page 8 of _____

Defendants' Exhibit No. 4

324

407a

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor 0400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
	Nursing Services - cont'd			
F181 182 XRF123 128 134 135 136 137 279	13. Medications are administered by Licenced practical nurses by waiver, who have not passed a state approved medication course. Reg. 405.1124 (g),(a),(c) 405.1127 (d)		13. Medications are only administered by R.N.s and LGPN's as of 3/15/77.	3/15/77
F183 XRF189 190 128 134 135 136 123 263 264 267 268 279	14. The following medications were ordered by the physician but were not Available. a) Tylenol b) Phenergan (I.M.) c) Coldesene Powder d) Darven compound 65mg e) Oxcaine f) Kaopectate g) A and D Ointment h) Milk of Magnesia		14. Policy has been reviewed by Pharmacy Consultant and D.O.N.. The three-way check method has been reinforced. LICENSING, SCHEDULING APR 18 1977 CARE	5/31/77 10467
F186 XRF346 128 263 264 267 279	15. Five (5) individual medication records lacked charting of all doses of medications and treatments as ordered by the physician. Reg. 405.1124 (g),(n) 405.1132 (c) 405.1127 (a), (d)		15. D.O.N. has been consulted on this matter and responsibility of supervision has been delegated to RN supervisor.	3/31/77

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor 0400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

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	Nursing Services - cont'd			
F187 XRF128 279	16. Medications for afternoon administration were observed pre-poured at 9:30 a.m. for the 5th floor patients. Reg. 405.1124 (g), (a) 405.1127 (d)		16. D.O.N. consulted the medication nurse responsible. Situation corrected immediately.	3/11/77
F193 XRF346 128 279 350 352	17. Twenty-two (22) out of forty-five (45) current records reviewed lacked verbal orders signed by the physician within forty-eight (48) hours. Reg. 405.1124 (b), (e) 405.1132 (c), (d) 405.1127 (d)		17. Medical Director Consultant contacted and letters have been sent by him to all attending physicians. (letter attached)	5/31/77
F203 XRF128 279	18. The following medications were found at the patients bedside: a) One (1) tube of valisone ointment b) One (1) bottle of calamine lotion c) Two (2) tubes of zinc oxide d) One (1) bottle of alcohol e) One (1) bottle of mineral oil f) neosporin spray g) One (1) tube of preparation H h) One (1) bottle of Excedrin PM Reg. 405.1124 (i), (a) 405.1127 (d)		18. D.O.N. consulted on this matter and inservice training is in process. Responsibility for monitoring delegated to RN Supervisor. LICENSING, SCHEDULING APR 18 1977 CARE DEPT. OF HEALTH	5/31/77

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
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STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor #01400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
1	Dietetic Services			
	19. The food service supervisor is not a full-time employee of the facility.		19. Approved Food Service Supervisor is a full time employee not working less than 40 hours per week.	3/11/77
F209	Reg. 405.1125 (a)			
	20. Time spent in the facility by the consulting dietitian is not sufficient to provide adequate nutritional counseling for 190 patients or continuing liaison with medical and nursing staffs.		20. Dietician consultant contacted on this matter and will arrange to provide time needed for proper dietary counseling for patients, medical and nursing staffs.	5/31/77
F213	Reg. 405.1125 (e)			
	21. Observation of the meal service revealed: a) the luncheon meal on one day of the survey was not served as planned on the menu, i.e. lettuce and tomato was not served and a substitute of equivalent nutritional value was not provided. b) A 1500 calorie diet was not served the proper exchanges as planned on the menu.		21. Dietician consulted, substitute list provided is to be supervised and monitored by full time Food Service Supervisor.	4/15/77
F221 F224	Reg. 405.1125 (b) 405.1125 (c)			

10446

LICENSING, SCHEDULING & TREATMENT
APR 28 1977
DIVISION OF LONG TERM CARE
DEPT. OF HEALTH

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor #01400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

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	Dietetic Services - continued			
	22. The tray identification system established to insure that each patient receives his diet as ordered is not being properly implemented, i.e. it was observed that tray identification cards are removed prior to serving patient trays therefore not allowing for identification of special diets when serving beverages and desserts.		22. Administrator has consulted with Food Service Supervisor to reinforce facilities existing policy of tray cards remaining on tray throughout complete meal service.	3/31/77
F224	Reg. 405.1125 (c)			
	23. There was no evidence that substitutes were offered to patients who were observed refusing food.		23. Problem being corrected by ongoing inservice training programs established as a result of a meeting between the Administrator, D.O.N. and Food Service Supervisor. Aides will monitor patient's trays to establish that patient is refusing food. Charge nurse obtains substitute food from dietary department.	4/15/77
F239	Reg. 405.1125 (e)			
F272 275 278	Pharmaceutical Services			
	24. The following medications were improperly labeled: a) mandelamine was ordered q.i.d. - p.r.n. was hand-written on the label. b) isordil was ordered 10mg t.i.d. - the label read one (1) tablet four (4) times a day.		24. a.-f. Correction same as item #14.	10446

LICENSING, SCHEDULING & TREATMENT
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	Pharmaceutical Services - cont'd c) lasix was ordered to be given with orange juice - this was not indicated on the label d) tylenol was ordered two (2) tablets every four (4) hours p.r.n. - the label stated only tylenol p.r.n. e) Calamine lotion was labeled with only the patient's name f) two (2) tubes of zinc oxide had no label from the pharmacy. Reg. 405.1127 (b), (c)		LICENSING SECTION APR 18 1977	
P282 XRF97 99	25. A nurse on the fifth floor was observed administering medications without the medication cardex. Reg. 405.1127 (d) 405.1122 (b)		25. Correction same as item #16	
P290 291 293 XR346	Laboratory and Radiologic Services 26. Physician's orders were not available for all urinalysis, x-ray and/or blood tests. Documentation of physicians being informed of abnormal laboratory or radiological findings was not available on the medical record.		26. Existing policy of Physicians signing orders for all diagnostic tests is being reinforced thru Medical Direction Consultant Committee. 5/31/77 New policy and procedure has been established by Medical Direction Consultant Committee and was implemented on 3/16/77. 3/16/77	

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 13 of _____

329

412a

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

(X1) PROVIDER NUMBER	(X2) MULTIPLE CONSTRUCTION:	(X3) DATE SURVEY COMPLETED
39-5337 Vendor #01;00357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

(X4) ID PREFIX TAG	SUMMARY STATEMENT OF DEFICIENCIES (EACH DEFICIENCY SHOULD BE PRECEDED BY FULL REGULATORY OR LSC IDENTIFYING INFORMATION.)	ID PREFIX TAG	PROVIDER'S PLAN OF CORRECTION (EACH CORRECTIVE ACTION SHOULD BE CROSS-REFERENCED TO THE APPROPRIATE DEFICIENCY.)	(X5) COMPLETION DATE
	Laboratory and Radiologic Services - cont'd Seven (7) X-ray or laboratory tests which were ordered by the physician did not have reports of these studies available. Reg. 405.1128 (a) 405.1132 (c)		Future monitoring and supervision to be done by D.O.N. and Asst. D.O.N. D.O.N. and Asst. D.O.N. consulted on this matter. Error on part of X-ray service. Checklist established to prevent recourence of this incident. 3/31/77	
	Dental Services			
P301 302 XR F148 49	27. Documentation of the advisory dentist participating in staff development programs was not available. Reg. 405.1129 (a) 405.1121 (h)		27. Dental Consultant contacted and arrangement for staff development program has been made to commence on 5/4/77.	
	Social Services			
F316 319 XRF311	28. The consultant for social services is not qualified. Reg. 405.1130 (b)(a)		28. Agreement with qualified MSW signed 4/7/77. In addition, an approved Social Service Worker is employed on a full time basis.	

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 14 of _____

330

413a

Defendants' Exhibit No. 5

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
O.M.B No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

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39-5337 Vendor # 0400357	A. BUILDING _____ B. WING _____	3/8, 9, 10, 11/77

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	Patient Activities		10546	
F330 F331	29. The activities program is not meeting the individual needs of all the patients as evidenced by patients sitting idly in the lounge areas and bedrooms on all floors. Reg. 405.1131 (b)		29. Approved full time recreational director is expanding activity program to meet patient needs.	5/31/77
F335 334 345 346 XRP347 73 81 85 521 522	**Medical Records** 30. A review of forty-five (45) inpatient medical records revealed the following: a) seventeen (17) records contained inadequate or incomplete assessment of the patients needs by the physician and/or nursing staff. b) forty-five (45) records lacked individualized assessment of the patient for discharge planning. c) forty-five (45) records lacked patient plans of care which reflect the current status of the patient and/or progress towards stated goals. d) consent forms on four (4) records were not signed by the patient and/or guardian e) two (2) records lacked nursing histories		LICENSING, CERTIFICATION & SURVEY APR 18 1977 DIVISION OF LONG TERM CARE DEPT. OF HEALTH 30. a. Existing policies reviewed and to be reinforced by supervisor, by D.O.N., and Asst. D.O.N. b. Full time social service worker is in the process of reviewing allpatients charts to develop adequate discharge planning. c. PACE approach to determining patient's goals to be established and to be complete by 6/30/77. d. Existing policy of having consent form signed by patient and/or responsible party by Admissions office has been reinforced. Situation totally corrected by 5/31/77.	5/31/77 6/30/77 6/30/77 5/31/77

331

Defendants' Exhibit No. 4

FORM SSA-2567A (11-75) I. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE Page 15 of _____

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
O.M.B No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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	Medical Records - cont'd f) monthly nursing summaries were lacking as follows: 1) twenty-eight (28) current records lacked summaries by 7-3 shift nursing personnel 2) twelve (12) current records lacked summaries by 3-11 shift nursing personnel 3) eleven (11) current records lacked summaries by 11-7 shift nursing personnel g) Eighteen (18) current records reviewed lacked one or more of the following categories of information: 1) diagnostic and/or therapeutic orders 2) observation and/or progress notes 3) reports of treatments and/or clinical findings Reg. 405.1132 (c) 405.1120 (c) 405.1121 (x)(7), (1) 405.1137 (h)		e. To be corrected by ongoing in-service program. f.(1-3) Existing policy reviewed and to be reinforced by D.O.N. and Asst. D.O.N. supervision. 10546 g. Medical Director Consultant contacted and program for correction being developed by contacting attending physicians. LICENSING, CERTIFICATION & SURVEY APR 18 1977 DIVISION OF LONG TERM CARE DEPT. OF HEALTH	5/31/77 5/15/77 5/31/77
F353 354 355 XRP346	31. Fourteen (14) out of fourteen (14) closed medical records reviewed lacked discharge summaries by the physician. Reg. 405.1132 (c), (c)		31. Discharge Summaries are required from all attending physicians and are being documented on patient's progress notes. D.O.N. and Asst. D.O.N. are auditing discharged patient's charts to insure completion.	3/30/77

332

Defendants' Exhibit No. 4

FORM SSA-2567A (11-75) I. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE Page 16 of _____

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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39-5337 Vendor # 0400357	A. BUILDING _____ B. WING _____	3/6, 9, 10, 11/77

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	Physical Environment			1 546
F366	32. Patients were observed, unattended, in patient lounges with no provisions for summoning assistance. Reg. 405.1134		32. Nurses aid to be assigned to patient lounges and/or tap bells will be provided for patients for summing assistance.	4/30/77
F388	33. The facility does not provide a means for the blind to identify hazardous areas. Reg. 405.1134 (c)(5.11)		33. Addendum to policy and procedure for handicapped patients to include tape on handles of entrances to hazardous areas. (Copy attached)	4/30/77
F389	34. The facility does not provide simultaneous audible and visual warning signals. Reg. 405.1134 (c)(5.12)		34. Waiver of Visual Warning requested from Department of Health. (Copies attached)	
F396 397 XRP366 75	35. Five (5) patients were observed in bed with the patient call bell out of reach. Patients who were observed sitting in chairs did not have call bells within reach. Privacy curtains in several patient rooms on the 2nd and 3rd floors were too short to ensure privacy in treatment and/or care. Reg. 405.1134 (e) 405.1121 (k)(9)		35. Call system available. Ongoing inservice training to Nurse's Aides to properly place patients. Cubical curtains on order.	

APR 18 1977
DIVISION OF LONG-TERM CARE
DEPT. OF HEALTH

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 12 of _____

333

416a

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
Continuation Sheet

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39-5337 Vendor #0400357	A. BUILDING _____ B. WING _____	March 11, 1977

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	Physical Environment - cont'd			
F416 418 419	36. The following were in need of repair: a) protective cap was missing from the bed in room 511. b) cement was cracking away from the beam in the food storage area. c) the paper was coming off the wall outside room 511. d) assist bars were not provided for the toilet in the bathroom in room511. e) Room 412 - Assist bars were not provided for the toilet, the metal door on the closet was bent and had sharp edges protruding f) Room 456 - the dresser drawer was missing a piece on the bottom g) Room 309 - the dresser drawer had no handles. h) Room 313 - radiator cover was broken i) Room 314 - side-rail on the patients bed was broken, the radiator cap was missing, the radiator cover (in the closet) was coming loose from the radiator, plaster was flaking above the radiator in the closet. j) Room 415 - the sink in the bathroom was coming away from the wall. k) Trash was observed stored in the fire exit stairwell (original building) on the 4th and 5th floors.		36. a.-u. Existing policy and procedure of using a daily quality control report to be continued by Administration, Nursing, and Maintenance Supervisor will correct the ongoing task of repairing minor physical environment problems. Supervision of corrections is the responsibility of the administrator. Copy of quality control report attached.	1 546

APR 18 1977
DIVISION OF LONG-TERM CARE
DEPT. OF HEALTH

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 13 of _____

334

417a

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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	Physical Environment - cont'd l) Fifth floor dining room - burn marks were observed on the floor m) Call bells were not functioning in rooms 353 and 550. n) Room 509 - wall paper was peeling off the wall o) Room 517 - corner baseboard radiator cover was loose and the overbed light was not functioning p) Room 516 - (tub room) had broken tiles q) Room 351 - (the cover for the commode was broken r) Water fountain (3rd floor) was not working s) Room 318 - bathroom tiles were broken t) Room 554 - (tubroom) the knob was off the call bell leaving a sharp edge exposed u) Room 317 - the cord to the overbed light could not be reached by the patient. Reg. 405.1134 (i)		See response on page #18 10:44 LICENSING CONDUCTING UNIT APR 18 1977 DEPT. OF HEALTH	
F420 421 XR F41 45	37. Thermometers were not available on the nursing unit to be able to assure the proper temperature of bath and shower water. There was a strong odor of urine on the 4th and 5th floors and room 206 on the 2nd floor.		37. Water temperatures are controlled at source by central mixing valve. Water temperature at tap does not exceed 110 degrees. Thermometer will be issued to each nurse's station in order to insure proper temperature for special purposes. 5/3/77	

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 12 of _____

335

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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	Physical Environment - cont'd The following unacceptable conditions were observed: a) the floor in room 508 was sticky and encrusted with food particles. b) Room 511 - a bedpan was stored on the floor under the bedside cabinet and a soiled basin was observed on the floor in the bathroom. c) Room 309 - the cubicle curtain was stained with an unidentifiable substance. d) Room 417 and 421 - had an offensive odor e) Room 552 - paper towels were not available in the bathroom, the water pitcher tray and urinal were soiled with dirt. f) Room 509 - the bathroom sink was dirty g) Room 517 - the bathroom floor was soiled h) Room 402 - the bathroom lacked paper towels i) Room 450, 451 and 452 - the bathroom floors were soiled. j) Room 412 - bedpan was observed on the bedside stand k) Fourth floor employee bathroom - sink and floor were dirty, stained		Following exit interview, a survey of facility by the Administrator and D.O.N. failed to detect any strong urine odors in the facility. This is an ongoing situation due to the fact that many patients in long term care are incontinent. 37. a.-k. Correction same as item # 36 10:44 LICENSING CONDUCTING UNIT APR 18 1977 DEPT. OF HEALTH	

FORM SSA-2567A (11-75)

1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

Page 20 of _____

336

Defendants' Exhibit No. 4

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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	Physical Environment - cont'd E) - continued and aches were observed in both a areas. Reg. 405.1134 (j) 405.1121 (g)		See response on page # 20 [illegible] CONSULTING [illegible] UNIT APR 18 1977 DIVISION OF LONG-T[illegible] DEPT. OF	
F429 431 432 435 436 XRF97 99	Infection Control 38. A used disposable douche set was observed stored in the bedside cabinet in room 401. The tip to the foley catheter drainage bag was observed stored uncovered in a hole on the bedframe. Reg. 405.1135 (a), (b) 405.1122 (b)		D.O.N., when consulted during survey, corrected immediately, person responsible was reprimanded.	10:46 3/11/77
F429 431 432 444 446 XRF97 99	39. Procedures for the handling of clean and soiled linen are not being followed as evidenced by: a) The laundress was observed carrying clean linen, in a mesh bag, over her shoulder. b) Three (3) soiled bags of laundry were observed on the floor of the		39. a.-c. Laundress counseled by administrator and Housekeeping Supervisor. Inservice training program was conducted to insure correction.	3/31/77

Defendants' Exhibit No. 4

337

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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	Infection Control - cont'd b) cont'd - laundry room. c) Clean linen, in a mesh bag, was observed on the floor in room 511. d) Clean linen was observed on soiled chairs. Clean and soiled linen were stored together on overbed tables. e) soiled chux were observed in the clean linen storage area on the 4th floor. f) the laundress also perform housekeeping duties. g) soiled linen bags were observed encrusted with an unidentifiable substance both on the inside and outside of the bags. Reg. 405.1135 (a), (b), (d) 405.1122 (b)		d.,e. Policy established and made operational for the care and handling of clean or soiled linen. Inservice training was conducted. This will be reinforced by the Nursing Supervisor and charge nurse. f. Housekeeper, when distributing linens, will change uniform and wash hands thoroughly. g. Linen supply company contacted and informed that linen bags must be laundered and cleaned for delivery.	10:46 4/30/77 3/31/77 4/30/77
F457 459	Disaster Preparedness 40. A fire drill conducted by the survey team revealed the following: a) Fifth floor - only one side was available on the old wing, patients were left unattended in the day room with		40. Fire drills and Inservice are conducted on a regular basis by a professional fire drill service. Assignments for lunch and breaks to be established in order that an adequate number of staff is on the floors at all times.	18 377

Defendants' Exhibit No. 4

338

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0931

STATEMENT OF DEFICIENCIES AND PLAN OF CORRECTION
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	Disaster Preparedness - cont'd			
F457 459	a) cont'd - the door closed, no-one assumed a charge position and no one assumed responsibility for the retrival of records. b) Fourth floor - housekeeping personnel continued to clean, Room 404 the door was held open, patients were left unattended in the lounge, room 409,413 and no one assumed responsibility for the retrieval of records. The doors to rooms 450, 453, 451, 455 and 459 were left open. c) Second and third floors - no one assumed responsiblity for the retrieval of records. Reg. 405.1136(b)		10:46 LICENSING APR 18 1977 HEALTH CARE DEPT. OF HEALTH	
	Utilization Review			
F465 467	41. Two physicians who are not professionally involved in the cases reviewed are not always present at the utilization review committee meetings Reg. 405.1137 (b)		41. Structure of URC Meetings assures two physicians not professionally involved with the patients reviewed are present at all meetings.	3/23/77

FORM SSA-2567A (11-75) 1. HEALTH INSURANCE REGIONAL OFFICE OR OFFICE OF LONG-TERM CARE

339

422a

Defendants' Exhibit No. 4

CERTIFICATION AND TRANSMITTAL

TO BE COMPLETED BY STATE SURVEY AGENCY

1. NAME AND ADDRESS OF FACILITY
(L3) Town Court Nursing Center
(L4) 1526 Lombard Street
(L5) Philadelphia, Penna. (L6) 19146

4. TO: DHEW REGIONAL OFFICE
Reg. III
Philadelphia, Penna.

TO: TITLE XIX SINGLE STATE AGENCY
Dept. of Health
Commonwealth of Pennsylvania

5. CATEGORY OF PROVIDER / SUPPLIER (L7)

01 ☐ Gen. Hosp.	05 ☐ HHA	09 ☐ Chronic Dialysis Unit
02 ☐ Psych. Hosp.	06 ☐ Independent Lab	
03 ☐ TB Hosp.	07 ☐ Portable X-Ray	10 ☐ ICF
04 ☒ SNF	08 ☐ Outpatient PT/SP	11 ☐ IMR

6. TYPE OF ACTION (L8) X Special health survey-HEW request
1 ☐ Initial
2 ☐ Recertification
3 ☐ Reconsideration
4 ☐ Change of Ownership
5 ☐ JCAH/AOA Validation
6 ☐ JCAH/AOA Investigation

7. DATE OF APPLICATION (Initial certifications ONLY) (L9)

8. ACCREDITATION VERIFIED (Initial) (L10) 1 ☐ JCAH 2 ☐ AOA

CHANGE IN ACCREDITATION-BASED CERTIFICATION (Initial)
1 ☐ Gained Accreditation 2 ☐ Lost JCAH Accreditation
3 ☐ Lost AOA Accreditation (L11)

(a) ☐ In compliance with program requirements (If appropriate, check applicable boxes below)
(b) ☐ Not in compliance with program requirements (If Title XIX only, complete item 13)

Compliance is based on:
(1) ☐ Acceptable P.O.C.
(2) ☐ CFR sec. 405.1010 (Access provisions)
(3) ☐ P.L. 91-690 (24 Hour RN)
(4) ☐ 1861(j)(15)(7 day RN rural SNF)
and or approved waiver(s) of the following requirements:
(5) ☐ Life Safety Code
(6) ☐ ANSI (Std. A 117.1)
(7) ☐ Organized Medical Staff
(8) ☐ Patient Room Size
(9) ☐ Beds Per Room

(c) ☐ Reapproval Delayed Until. (See Remarks)
(d) ☐ SNF/ICF Cancellation Date is:
(1) ☐ Invoked
(2) ☐ Rescinded

LICENSING, SCHEDULING & TRAINING UNIT
MAR 2 3 1977
DEPT. OF HEALTH

11. SNF/ICF PERIOD OF CERTIFICATION (L13)
(a) FROM (b) TO:

(c) CANCELLATION DATE (SNF/ICF) (L14)

SUPPLEMENTAL INFORMATION ON HOSPITALS AND SNF'S NOT IN COMPLIANCE (L15)
(a) Hospital meets emergency services hospital definitions (1) ☐ Yes (2) ☐ No
(b) Facility meets 1861(e) (1) - Definition of hospital (1) ☐ Yes (2) ☐ No
(c) Facility meets 1861(j) (1) - Definition of SNF
(1) ☐ Yes (2) ☐ No (3) ☐ See attached SSA 1539 (a)

13. SUPPLEMENTAL ICF INFORMATION (L16)
(a) Completion date for ICF/LSC compliance
(b) 249.13 ICF Phase in Date

14. TOTAL OR DISTINCT PART CERTIFICATION	HOSPITALS	XVIII SNF	XVIII/XIX SNF	XIX SNF	XIX ICF	XIX IMR
BEDS CERTIFIED (L17)	(a)	(b)	(c) 198	(d)	(e)	(f)
BEDS PREVIOUSLY CERTIFIED (L18)	(g)	(h)	(i) 198	(j)	(k)	(l)

15. STATE SURVEY AGENCY REMARKS Report of Special Health Survey Attached

16. SIGNATURE Judith A. Passerin
TITLE Registered Nurse

17. DATE (L19) 11 22 77

18. SIGNATURE Jay B. Laff
TITLE Director, Division of Long Term Care

19. DATE (L20) 4 VOID

TO BE COMPLETED BY THE DHEW REGIONAL OFFICE OR SINGLE STATE AGENCY

20. DETERMINATION OF ELIGIBILITY (L21)
1 ☐ Facility is eligible to participate
2 ☐ Facility is not (or no longer) eligible to participate (If Title XIX only, complete item No. 26)

21. ☐ Facility is in compliance with Title VI of Civil Rights Act (L22)

22. ☐ Statement of financial solvency filed in accordance with regulation 405.603. (L23)

23. EFFECTIVE DATE OF (Enter All Applicable)
(a) PARTICIPATION (L24)
(b) AGREEMENT ENDING DATE (SNF) (L25)
(c) CANCELLATION DATE (SNF) (L26)
(d) SNF/ICF AGREEMENT EXTENDED UNDER SEC. 1866(e)(1)(C) OF SOCIAL SECURITY ACT UNTIL: (MAXIMUM OF 60 DAYS) (L27)
(e) TERMINATION OR NON-RENEWING DATE (L28)
(f) EMERGENCY SERVICES (L29)

24. VOLUNTARY TERMINATION (L30) 1 ☐ CLOSURE 2 ☐ WITHDRAWAL 3 ☐ OTHER (Specify)

25. INTERMEDIARY NUMBER (L31)

26. REMARKS

27. PHS REVIEW (If Any applicable)
28. DATE (L32)
29. DETERMINATION APPROVED
30. DATE (L33)

Form SSA-1539 (11-76) OFFICE OF RESEARCH & STATISTICS

DEFENDANTS' EXHIBIT NO. 5

423a

Form Approved OMB No. 72-R[illegible]

MEDICARE/MEDICAID SKILLED NURSING FACILITY SURVEY REPORT

PROVIDER NUMBER (TITLE XVIII) F1: 39-5337

VENDOR NUMBER (TITLE XIX) F2: 0400357

NAME OF FACILITY	STREET ADDRESS	CITY	COUNTY	STATE	ZIP CODE
Town Court Nursing Center	1526 Lombard St	Phila	Phila	PA	19146

SURVEYED BY F3	SURVEYOR'S PROFESSIONAL TITLE	F4 (1) ☐ INITIAL SURVEY (2) ☒ RE-SURVEY	DATE SURVEYED F5
Claire Richards	Registered Nurse	Medicare	3/5, 3/9, 3/10, 3/[illegible]
LIST ADDITIONAL SURVEYORS' NAMES F6	TITLE	Medicaid	1977
Joseph Hopkins	Registered Nurse	Licensure	
Lois Mauney	Dietitian	Title VI	
Jacqueline Stitty	Equal Opportunity Development Specialist		

F7	YES	NO	N/A	☒ MET ☐ NOT MET	EXPLANATORY STATEMENTS
				I. Compliance with Federal, State, and local laws. (405.1120) — The skilled nursing facility is in compliance with applicable Federal, State, and local laws and regulations.	13046 LICENSING, SCHEDULING & TRACKING UNIT APR 4 1977 DIVISION OF LONG TERM CARE DEPT. OF HEALTH
F8				☒ MET ☐ NOT MET	

(a) Standard: Licensure.

The facility, in any State in which State or applicable local law provides for licensing of facilities of this nature:

(1) Is licensed pursuant to such law; or

(2) If not subject to licensure, is approved by the agency of the State or locality responsible for licensing skilled nursing facilities as meeting fully the standards established for such licensing, and

(3) Except that a facility which formerly met fully such licensure requirements, but is currently determined not to meet fully all such requirements, may be recognized for a period specified by the State standard-setting authority.

FORM SSA-1569 (10-74)

1

NAME OF FACILITY: Town Court Nursing Center — 39-5337 0400357

Compliance with Federal, State and local laws (continued)

	YES	NO	N/A		EXPLANATORY STATEMENTS
F9				EXPIRATION DATE OF LICENSE: June 24, 1977	Licensed by the Commonwealth of Pennsa., Dept of Health
F10				TOTAL NUMBER OF BEDS: 198	
F11				NUMBER OF SKILLED BEDS MEDICARE: 198	
F12				NUMBER OF SKILLED BEDS MEDICAID: 198	
F13				☒ MET ☐ NOT MET	

(b) Standard: Licensure or registration of personnel.

Staff of the facility are licensed or registered in accordance with applicable laws.

F14 ☐ MET ☒ NOT MET

(c) Standard: Conformity with other Federal, State, and local laws.

The facility is in conformity with all Federal, State, and local laws relating to fire and safety, sanitation, communicable and reportable diseases, postmortem procedures, and other relevant health and safety requirements.

Title VI - Compliance 3/11/77

L.S.C - letter dated 1/4/77 survey 11/29/76 acceptable plans of correction 12/20/76

Sanitation - 12/3/76

Fire Alarm Insp - 2/24/77

Sprinkler Insp - 9/10/76

F14 The written agreement with the L.C.L facility has expired.

Cross reference pg 47, Reg 405-1132(c) - F346 deficiency "c", monthly summaries by nurse

Two pts records reviewed locked yearly CBC and urinalysis reports

FORM SSA-1569 (10-74)

2

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0460357

	YES	NO	N/A
F15 →			

☐ MET ☒ NOT MET

II. Governing body and management. (405.1121) — The skilled nursing facility has an effective governing body, or designated persons so functioning, with full legal authority and responsibility for the operation of the facility. The governing body adopts and enforces rules and regulations relative to health care and safety of patients, to the protection of their personal and property rights, and to the general operation of the facility. The governing body develops a written institutional plan that reflects the operating budget and capital expenditures plan.

F16 → ☒ MET ☐ NOT MET

(a) Standard: Disclosure of ownership.

The facility supplies full and complete information to the survey agency as to the identity (1) of each person who has any direct or indirect ownership interest of 10 per centum or more in such skilled nursing facility or who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by such skilled nursing facility or any of the property or assets of such skilled nursing facility,

(2) in case a skilled nursing facility is organized as a corporation, of each officer and director of the corporation,

and (3) in case a skilled nursing facility is organized as a partnership, or each partner; and promptly reports any changes which would affect the current accuracy of the information so required to be supplied.

F17 → CHECK TYPE OF BUSINESS ORGANIZATION

(1) ☐ INDIVIDUAL (2) ☒ CORPORATION

(3) ☐ PARTNERSHIP (4) ☐ OTHER (Specify)

If unit is a for profit corporation, list name, address and titles of each officer of corporation and those persons owning 10% or more.

Officers: David Valorie - Pres. 8059 Golden Rd Lawrenceville, N.J.
Fred Applebaum - Sec - 1867 Rolling Lane, Cherry Hill, N.J.
Dorothy Gebert - Treas - 2907 Wakefield Dr. Warren, Pa

FORM SSA-1569 (10-74)

Governing Body and Management

EXPLANATORY STATEMENTS

F15 The governing body and administrators are not enforcing rules and regulations relative to the health care and safety of the patients as evidenced by lack of supervision of physician, nursing service and medical records. (see deficiencies)

Geriatric Medical Centers, Inc.

343

3

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0460357

	YES	NO	N/A
Ownership and % Owned			

If unit is solely owned, or owned by partnership, list name(s) and address(es) of owner(s).

F18 → ☒ MET ☐ NOT MET

(b) Standard: Staffing patterns.

The facility furnishes to the State survey agency information from payroll records setting forth the average numbers and types of personnel (in full-time equivalents) on each tour of duty during at least 1 week of each quarter. Such week will be selected by the survey agency.

F19 → ☐ MET ☒ NOT MET

(c) Standard: Bylaws.

F20	X		
F21	X		
F22	X		
F23		X	

The governing body adopts effective patient care policies and administrative policies and bylaws governing the operation of the facility, in accordance with legal requirements.

Such policies and bylaws are in writing, dated, and made available to all members of the governing body which ensures that they are operational, and reviews and revises them as necessary.

FORM SSA-1569 (10-74)

Governing Body (continued)

EXPLANATORY STATEMENTS

F19
F23 cross reference F15

344

4

NAME OF FACILITY: Town Court Nursing Center — 39-5337 / 040057

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A
F24			

☒ MET ☐ NOT MET

(d) Standard: Independent medical evaluation (medical review).

The governing body adopts policies to ensure that the facility cooperates in an effective program which provides for a regular program of independent medical evaluation and audit of the patients in the facility to the extent required by the programs in which the facility participates (including, at least annually, medical evaluation of each patient's need for skilled nursing facility care).

F25			

☐ MET ☒ NOT MET

F25, 27, 28 cross reference F15

(e) Standard: Administrator.

F26	X		
F27		X	
F28		X	
F29	X		
F30	X		
F31	X		

The governing body appoints a qualified administrator who is responsible for the overall management of the facility,

enforces the rules and regulations relative to the level of health care and safety of patients, and to the protection of their personal and property rights, and

plans, organizes, and directs those responsibilities delegated to the administrator by the governing body.

Through meetings and periodic reports, the administrator maintains ongoing liaison among the governing body, medical and nursing staffs, and other professional and supervisory staff of the facility, and

studies and act upon recommendations made by the utilization review and other committees.

In the absence of the administrator, an employee is authorized, in writing, to act on the administrator's behalf.

NAME OF ADMINISTRATOR: Mr. Donald Lewis

LICENSE NUMBER: NH001390 — EXPIRATION DATE: 6/30/78

NAME OF ALTERNATE ADMINISTRATOR: Mrs. Arnold Weiner — TITLE: assist. adm.

FORM SSA-1569 (10-74)

5

345

428a

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center — 39-5337 / 040057

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A
F32			

☒ MET ☐ NOT MET

(f) Standard: Institutional planning.

The skilled nursing facility, under the direction of the governing body, prepares an overall plan and budget which provides for an annual operating budget and a capital expenditure plan.

F33	X		

(1) There is an annual operating budget which includes all anticipated income and expenses related to items which would, under generally accepted accounting principles, be considered income and expense items (except that it is not required that there be prepared, in connection with any budget, an item by item identification of the components of each type of anticipated income or expense).

F34	X		

(2) (i) There is a capital expenditure plan for at least a 3-year period (including the year to which the operating budget described in paragraph (f)(1) of this section is applicable), which includes and identifies in detail the anticipated sources of financing for, and the objectives of, each anticipated expenditure in excess of $100,000.

In determining if a single capital expenditure exceeds $100,000, the cost of studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the acquisition, improvement, modernization, expansion, or replacement of land, plant, building, and equipment are included. Expenditures directly or indirectly related to capital expenditures, such as grading, paving, broker commissions, taxes assessed during the construction period, and costs involved in demolishing or razing structures on land are also included. Transactions which are separated in time but are components of an overall plan or patient care objective are viewed in their entirety without regard to their timing. Other costs related to capital expenditures include title fees, permit and license fees, broker commissions, architect, legal, accounting, and appraisal fees; interest, finance, or carrying charges on bonds, notes and other costs incurred for borrowing funds.

There are no capital expenditures over 100,000

FORM SSA-1569 (10-74)

6

346

Defendants' Exhibit No. 6

429a

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N.A
F35 →			
F36 →			
F37 →			

(ii) If the anticipated source of such financing is, in any part, the anticipated reimbursement from title V (Maternal and Child Health and Crippled Children's Services) or title XVIII (Health Insurance for the Aged and Disabled) or title XIX (Grants to States for Medical Assistance Programs) of the Social Security Act, the plan states:

F35 → 1. ☐ YES 2. ☐ NO 3. ☒ N.A

(a) Whether the proposed capital expenditure is required to conform, or is likely to be required to conform, to current standards, criteria, or plans developed pursuant to the Public Health Service Act or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, to meet the need for adequate health care facilities in the area covered by the plan or plans so developed;

F36 → 1. ☐ YES 2. ☐ NO 3. ☒ N.A

(b) Whether a capital expenditure proposal has been submitted to the designated planning agency for approval pursuant to section 1122 of the Social Security Act (42 U.S.C. 1320a-1) and implementing regulations.

F37 → 1. ☐ YES 2. ☐ NO 3. ☒ N/A

(c) Whether the designated planning agency has approved or disapproved the proposed capital expenditure if it has been so presented.

FORM SSA-1569 (10-74)

7

347

430a

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N.A
F38	X		
F39 →			
F40	X		
F41 →			
F42	X		

(3) The overall plan and budget is prepared under the direction of the governing body of the skilled nursing facility by a committee consisting of representatives of the governing body, the administrative staff, and the medical staff (or chief medical officer, or patient care policies advisory group as described in §405.1122(a)) of the skilled nursing facility.

F39 → OVERALL PLAN & BUDGET PREPARED BY REPRESENTATIVES OF:
1. ☒ GOVERNING BODY 4. ☒ ADMINISTRATIVE STAFF
2. ☐ MEDICAL DIRECTOR 5. ☐ MEDICAL STAFF
3. ☒ PATIENT CARE POLICIES ADVISORY GROUP

COMPOSITION OF COMMITTEE:

NAME	TITLE
Daniel Delorio	President
Fred Applebaum	Secretary
Dorothy Erhart	Treasurer
Jos Holbrook	Administrator
Donald Lewis	Asst. Administrator

F39 Committee members as of the July, 1976.

Agnes Stewart, RN, BSN

(4) The overall plan and budget is reviewed and updated at least annually by the committee referred to in paragraph (f)(3) of this section under the direction of the governing body of the skilled nursing facility.

☐ MET ☒ NOT MET

(g) Standard: Personnel policies and procedures.

The governing body, through the administrator, is responsible for implementing and maintaining written personnel policies and procedures that support sound patient care and personnel practices.

FORM SSA-1569 (10-74)

8

348

Defendants' Exhibit No. 6

431a

NAME OF FACILITY Town Crest Nursing Center 34-5337 0400357

	YES	NO	N/A
F43	X		
F44	X		
F45		X	
F46	X		
F47		X	
F48			
F49		X	
F50	X		
F51		X	
F52	X		

Personnel records are current and available for each employee and contain sufficient information to support placement in the position to which assigned.

Written policies for control of communicable disease are in effect to ensure that employees with symptoms or signs of communicable disease or infected skin lesions are not permitted to work,

that a safe and sanitary environment for patients and personnel exists, and

incidents and accidents to patients and personnel are reviewed to identify health and safety hazards.

Employees are provided, or referred for, periodic health examinations, to ensure freedom from communicable disease.

☐ MET ☒ NOT MET

(h) Standard: Staff development.

An ongoing educational program is planned and conducted for the development and improvement of skills of all the facility's personnel, including training related to problems and needs of the aged, ill, and disabled.

Each employee receives appropriate orientation to the facility and its policies, and to the employee's position and duties.

Inservice training includes at least prevention and control of infections, fire prevention and safety, accident prevention, confidentiality of patient information, and preservation of patient dignity, including protection of the patient's privacy and personal and property rights.

Records are maintained which indicate the content of, and attendance at, such staff development programs.

Governing Body (continued)

EXPLANATORY STATEMENTS

F 41, 45 Cross reference F 420, 421

F41
F47 The facility is not complying with its policy to have completed annual physical examinations and Chest x-Ray or mantoux tests on all employees. This is evidenced by
1) Lack of documentation of mantoux test or chest x-ray findings on 22 out of 67 employee records reviewed.
2) Physical examination results were lacking on 2 out of 67 employee records reviewed.

F48, 49 Cross reference F 301, 302

F48
F51 Documentation that inservice education programs were conducted for confidentiality of patient information and accident prevention were not available for review.

FORM SSA-1569 (10-74)

9

349

NAME OF FACILITY Town Crest Nursing Center 34-5337 0400357

	YES	NO	N/A
F53			
F54	X		
F55	X		
F56	X		
F57	X		
F58	X		

☒ MET ☐ NOT MET

(i) Standard: Use of outside resources.

If the facility does not employ a qualified professional person to render a specific service to be provided by the facility, it makes arrangements to have such a service provided by an outside resource — a person or agency that will render direct service to patients or act as a consultant to the facility.

The responsibilities, functions, and objectives, and terms of agreement, including financial arrangements and charges, of each such outside resource are delineated in writing and signed by an authorized representative of the facility and the person or the agency providing the service.

Agreements pertaining to services must specify that the facility assumes professional and administrative responsibility for the services rendered.

The outside resource, when acting as a consultant, apprises the administrator of recommendations, plans for implementation, and continuing assessment through dated, signed reports,

which are retained by the administrator for followup action and evaluation of performance. (See requirement under each service — 405.1125 through 405.1132.)

LIST OUTSIDE RESOURCES BY NAME AND SPECIALTY (e.g., S. Miller, physical therapy)

Barry Chase D.O. Medical Director
Mdui Berkowitz, D.D.S.
Beatrice R. Lucas R.D. R333026
Lucille Mirabito ART #3974 Wills Eye Hospital Eye Glass
Franklin A. Weiss RP 020264
Sydney B. Golub PT 000784 Eugene Joseph LaBella, PT 001474
F.J. Vita, D.P.M. 001331
Donna R. Tenia, Speech Pathologist
Debra Ackerman Social Services Consultant
Dawn Lab - #39-8109
Clay-Chapman Medical Services, Inc. #39-9800

FORM SSA-1569 (10-74)

10

350

NAME OF FACILITY: Dixon Court Nursing Center 39-5337 040357

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A
F59			
F60	X		
F61	X		
F62			
F63	X		
F64		X	
F65	X		
F66		X	

F59 ☒ MET ☐ NOT MET

(j) Standard: Notification of changes in patient status.

The facility has appropriate written policies and procedures relating to notification of the patient's attending physician and other responsible persons in the event of an accident involving the patient, or other significant change in the patient's physical, mental, or emotional status, or patient charges, billings, and related administrative matters.

Except in a medical emergency, a patient is not transferred or discharged, nor is treatment altered radically, without consultation with the patient or, if the patient is incompetent, without prior notification of next of kin or sponsor.

F62 ☐ MET ☒ NOT MET

(k) Standard: Patients' rights.

The governing body of the facility establishes written policies regarding the rights and responsibilities of patients and,

through the administrator is responsible for development of, and adherence to, procedures implementing such policies.

These policies and procedures are made available to patients, to any guardians, next of kin, sponsoring agency(ies), or representative payees selected pursuant to section 205(j) of the Social Security Act, and Subpart Q of Part 404 of this chapter, and to the public.

The staff of the facility is trained and involved in the implementation of these policies and procedures.

F62, 64 Cross reference F15

F66 cross reference with F68, 72, 73, 7[illegible]

NAME OF FACILITY: Dixon Court Nursing Center 39-5337 040357

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A
F67	X		
F68		X	
F69	X	3/16	
F70	X		
F71	X		

These patients' rights policies and procedures ensure that, at least, each patient admitted to the facility:

(1) Is fully informed, as evidenced by the patient's written acknowledgment, prior to or at the time of admission and during stay, of these rights and of all rules and regulations governing patient conduct and responsibilities;

(2) Is fully informed, prior to or at the time of admission and during stay, of services available in the facility, and of related charges including any charges for services not covered under titles XVIII or XIX of the Social Security Act, or not covered by the facility's basic per diem rate;

(3) Is fully informed, by a physician, of his or her medical condition unless medically contraindicated (as documented, by a physician, in the medical record), and is afforded the opportunity to participate in the planning of his or her medical treatment and to refuse to participate in experimental research;

(4) Is transferred or discharged only for medical reasons, or for his or her welfare or that of other patients, or for nonpayment for his or her stay (except as prohibited by titles XVIII or XIX of the Social Security Act), and is given reasonable advance notice to ensure orderly transfer or discharge, and such actions are documented in the medical record;

(5) Is encouraged and assisted, throughout the period of stay, to exercise rights as a patient and as a citizen, and to this end may voice grievances and recommend changes in policies and services to facility staff and/or to outside representatives of his or her choice, free from restraint, interference, coercion, discrimination, or reprisal;

F68 Procedures have not been developed, in writing, to inform patients of related charges and Charges not covered under title XVIII and XIX or charges not covered in the basic per diem rate

3/16 [illegible]

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 33-5337 0400357

Governing Body (continued)

	YES	NO	N/A		EXPLANATORY STATEMENTS
F72		X		(6) May manage his or her personal financial affairs, or is given at least a quarterly accounting of financial transactions made on his or her behalf should the facility accept his or her written delegation of this responsibility to the facility for any period of time in conformance with State law;	F72 Documentation that patients are given a quarterly accounting of financial transactions was not available for review
F73		X		(7) Is free from mental and physical abuse, and free from chemical and (except in emergencies) physical restraints except as authorized in writing by a physician for a specified and limited period of time, or when necessary to protect the patient from injury to self or to others;	F73 Three (3) patients observed in restraints did not have a physicians order Cross reference with 405.1124(c), F346 defining "f"
F74	X			(8) Is assured confidential treatment of personal and medical records, and may approve or refuse their release to any individual outside the facility, except in case of transfer to another health care institution, or as required by law or third-party payment contract;	
F75		X		(9) Is treated with consideration, respect, and full recognition of his or her dignity and individuality, including privacy in treatment and in care for personal needs;	F75 The following unacceptable situations were observed: a) an aide was observed bathing a patient, while the passages were present, with the patient completely nude. b) a patient was observed being pulled through the corridor (5th floor) with only a bathrobe on her wheelchair c) a female patient was observed being pushed in a wheelchair to the bathroom without bathroom. Care was not taken to protect the privacy that a person of same sex is not present d) two patients were observed being pushed by the same person in geri chairs one of which was being backwards see page 13A
F76	X			(10) Is not required to perform services for the facility that are not included for therapeutic purposes in the plan of care;	
F77	X			(11) May associate and communicate privately with persons of his or her choice, and send and receive personal mail unopened, unless medically contraindicated (as documented by his or her physician in the medical record);	

FORM SSA-1569 (10-74)

13

353

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 33-5337 0400357

Governing Body (continued)

EXPLANATORY STATEMENTS

a) Twenty-one (21) patients were observed with dirty, long fingernails.

b) Nine (9) male patients were observed in need of a shave, as evidenced by an excessive growth of beard.

c) Eighteen (18) patients were observed with poor oral hygiene (i.e. food particles in teeth and/or dentures, teeth missing, food particles in mouth, bad odor, gums)

d) Thirty-three (33) patients plus patients observed in the 3rd and 4th floor lounges were inappropriately dressed (i.e. no undermen, no shoes or socks, dressed with a towel, stained or torn clothes)

e) a patient in Rm 510 was observed lying on her decubitis ulcer (with no dressing) in cold urine. Approximately five (5) patients were observed lying on soiled urine

f) a patient was observed in Rm. 514 with what appeared to be vomitus on his face, shoulder and bed

LICENSING, SCHEDULING & TRAINING UNIT
APR 1 1977
Division of Long Term Care
Dept. of Health

FORM SSA-1569 (10-74)

13A

354

438a

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A	
F78	X			(12) May meet with, and participate in activities of, social, religious, and community groups at his or her discretion, unless medically contraindicated (as documented by his or her physician in the medical record);
F79	X			(13) May retain and use personal clothing and possessions as space permits, unless to do so would infringe upon rights of other patients, and unless medically contraindicated (as documented by his or her physician in the medical record); and
F80	X			(14) If married, is assured privacy for visits by his/her spouse; if both are inpatients in the facility, they are permitted to share a room, unless medically contraindicated (as documented by the attending physician in the medical record).
				All rights and responsibilities specified in paragraphs (k)(1) through (4) of this section — as they pertain to (a) a patient adjudicated incompetent in accordance with State law, (b) a patient who is found, by his or her physician, to be medically incapable of understanding these rights, or (c) a patient who exhibits a communication barrier — devolve to such patient's guardian, next of kin, sponsoring agency(ies), or representative payee (except when the facility itself is representative payee) selected pursuant to section 205(j) of the Social Security Act and Subpart Q of Part 404 of this chapter.

355

FORM SSA-1569 (12-74)

14

439a

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Governing Body (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A	MET ☐ NOT MET ☒
F81				*(l) Standard: Patient care policies.* The skilled nursing facility has written policies to govern the continuing skilled nursing care and related medical or other services provided.
F82	X			The facility has policies, which are developed by the medical director or the organized medical staff (see §405.1122), with the advice of (and with provision for review of such policies from time to time, but at least annually, by) a group of professional personnel including one or more physicians and one or more registered nurses, to govern the skilled nursing care and related medical or other services it provides.
F83	X			The policies, which are available to admitting physicians, sponsoring agencies, patients, and the public, reflect awareness of, and provision for, meeting the total medical and psychosocial needs of patients, including admission, transfer, and discharge planning, and the range of services available to patients, including frequency of physician visits by each category of patients admitted.
F84	X			These policies also include provisions to protect patients' personal and property rights.
F85		X		Medical records and minutes of staff and committee meetings reflect that patient care is being rendered in accordance with the written patient care policies.
F86	X			And that utilization review committee recommendations regarding the policies are reviewed and necessary steps taken to ensure compliance.

F81
F85 cross reference F344, 345, 346

356

FORM SSA-1569 (12-74)

15

NAME OF FACILITY: Town Court Nursing Center — 39-5337 — 040357

	YES	NO	N/A		Governing Body (continued) — EXPLANATORY STATEMENTS
F87 →				DATE OF LAST REVIEW OF POLICIES: June 30, 1976	
F88	X			The medical director or a registered nurse is designated, in writing, to be responsible for the execution of patient care policies.	
F89			X	If the responsibility for day-to-day execution of patient care policies has been delegated to a registered nurse, the medical director serves as the advisory physician from whom this nurse receives medical guidance. (See §405.1122(b).)	
				COMPOSITION OF PATIENT CARE COMMITTEE: (List names and titles of members)	Composition of Committee as of June 30, 1976 meeting.
				Mr. Donald Lewis	
				Mrs. Steward, L.P.N. DON.	
				Mrs Bryer, L.P.N.	
				Miss Gamme,	
				Mr. Holbrook, Administrator	
				Mr. Hess, R.P. - Consulting Pharmacist	
				Dr. Lovello D.O. Medical Director	
				Mr. Fletcher	
				LIST NAME AND TITLE OF PERSON RESPONSIBLE FOR EXECUTION OF PATIENT CARE POLICIES. (If RN, list name of advisory physician.)	
				Barry Chase, D.O - medical director	

FORM SSA-1569 (10-74)

357

16

440a

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center — 39-5337 — 040357

	YES	NO	N/A		Medical Direction — EXPLANATORY STATEMENTS
F90 →				☐ MET ☒ NOT MET	F90 Cross reference F101, 103, 104, 109, 110, 111 and 112
				III. Medical direction. (405.1122) — The facility retains, effective not later than 12 full calendar months from 12/02/74, pursuant to a written agreement, a physician, licensed under State law to practice medicine or osteopathy, to serve as medical director on a parttime or full-time basis as is appropriate for the needs of the patients and the facility. If the facility has an organized medical staff, the medical director is designated by the medical staff with approval of the governing body. A medical director may be designated for a single facility or multiple facilities through arrangements with a group of physicians, a local medical society, a hospital medical staff, or through another similar arrangement. The medical director is responsible for the overall coordination of the medical care in the facility to ensure the adequacy and appropriateness of the medical services provided to patients and to maintain surveillance of the health status of employees. (See §405.1911(b) regarding waiver of the requirement for a medical director.)	
F91 →				Medical director is designated by: (1) ☒ Facility Name of Physician Barry Chase, D.O. (2) ☐ Arrangement with _____ (Specify: Local medical society by name, etc.)	
F92 →				Medical director is: (1) ☐ Full-time (2) ☑ Part-time	
F93 →				and serves 4 hours per week.	
F94 →				☐ MET ☒ NOT MET (a) Standard: Coordination of medical care.	F94, 96 Cross reference F101, 103, 104 109, 110, 111 and 112
				Medical direction and coordination of medical care in the facility are provided by a medical director.	
F95	X			The medical director is responsible for the development of written bylaws, rules, and regulations which are approved by the governing body and include delineation of the responsibilities of attending physicians.	

FORM SSA-1569 (10-74)

358

17

Defendants' Exhibit No. 6

441a

NAME OF FACILITY: Town Court Nursing Center 34-5337 c460357

Medical Direction (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A	
F96		X		Coordination of medical care includes liaison with attending physicians to ensure their writing orders promptly upon admission of a patient, and periodic evaluation of the adequacy and appropriateness of health professional and supportive staff and services.
F97 →				☐ MET ☒ NOT MET *(b) Standard: Responsibilities to the facility.* The medical director is responsible for surveillance of the health status of the facility's employees.
F98	X			Incidents and accidents that occur on the premises are reviewed by the medical director to identify hazards to health and safety.
F99		X		The administrator is given appropriate information to help ensure a safe and sanitary environment for patients and personnel.
F100	X			The medical director is responsible for the execution of patient care policies in accordance with §405.1121(i).

F97, 99
Cross reference

359

FORM SSA-1569 (10-74)

18

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 34-5337 c460357

Physician Services

EXPLANATORY STATEMENTS

	YES	NO	N/A	
F101 →				☐ MET ☒ NOT MET **IV. Physician services. (405.1123)** — Patients in need of skilled or rehabilitative care are admitted to the facility only upon the recommendation of, and remain under the care of, a physician. To the extent feasible, each patient of the patient's sponsor designates a personal physician.
F102 →				☐ MET ☒ NOT MET *(a) Standard: Medical findings and physicians' orders at time of admission.* There is made available to the facility, prior to or at the time of admission, patient information which includes current medical findings, diagnoses, and orders from a physician for immediate care of the patient.
F103		X		
F104		X		Information about the rehabilitation potential of the patient and a summary of prior treatment are made available to the facility at the time of admission or within 48 hours thereafter.
F105 →				☐ MET ☒ NOT MET *(b) Standard: Patient supervision by physician.* The facility has a policy that the health care of every patient must be under the supervision of a physician, who
F106	X			based on a medical evaluation of the patient's immediate and long-term needs, prescribes a planned regimen of total patient care.
F107		X		
F108	X			All attending physicians are required to make arrangements for the medical care of their patients in their absence.
F109		X		The medical evaluation of the patient is based on a physical examination done within 48 hours of admission unless such examination was performed within 5 days prior to admission.
F110		X		The patient is seen by the attending physician at least once every 30 days for the first 90 days following admission.

F101, 102, 104 Individualized rehabilitative potential of the patient was not available on forty-five (45) out of forty-five (45) medical records reviewed - cross reference F169, 170, 171, 172, 346 a.

F101, 105 F107 Specific immediate and long term goals to meet the individual need of the patient were not available on forty-five (45) out of forty-five (45) medical records reviewed cross reference F346 a.

F101, 103, 102, 105 F109 Nine (9) current medical records reviewed lacked admission history and/or physical cross reference F346 a.

F110
Cross reference F14

360

FORM SSA-1569 (10-74)

19

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Physician Services (continued)

EXPLANATORY STATEMENTS

Cross reference F14, 346 "A"
F112 - Nine(19) out of forty-five active medical records had only blocked progress notes being written at the time of each visit. The facility does not have alternate schedule of visits

	YES	NO	N/A	
F111		X		The patient's total program of care (including medications and treatments) is reviewed during a visit by the attending physician at least once every 30 days for the first 90 days, and revised as necessary.
F112		X		A progress note is written and signed by the physician at the time of each visit, and all orders are signed by the physician.
F113	X			Subsequent to the 90th day following admission, an alternate schedule for physician visits may be adopted where the attending physician determines and so justifies in the patient's medical record that the patient's condition does not necessitate visits at 30-day intervals
F114	X			This alternate schedule does not apply for patients who require specialized rehabilitative services, in which case the review must be in accordance with 405.1126(b).
F115	X			At no time may the alternate schedule exceed 60 days between visits.
F116	X			If the physician decides upon an alternate schedule of visits of more than 30 days for a patient, (1) in the case of a Medicaid benefits recipient, the facility notifies the State Medicaid agency of the change in schedule, including justification, and (2) the utilization review committee or the medical review team (see 405.1121(d)) promptly reevaluates the patient's need for monthly physician visits as well as the continued need for skilled nursing facility services (see 405.1137(d)).
F117	X			If the utilization review committee or the medical review team does not concur in the schedule of visits at intervals of more than 30 days, the alternate schedule is not acceptable.

FORM SSA-1569 (10-74)

361

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Physician Services (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A	
F118				LIST NUMBER OF SKILLED NURSING PATIENTS ON ALTERNATE SCHEDULE OF VISITS: MEDICARE: 0
F119				MEDICAID: 0
F120				WERE ALTERNATE SCHEDULES APPROVED BY UR COMMITTEE? (1) ☐ YES (2) ☐ NO (3) ☒ N/A
F121				WAS STATE MEDICAID AGENCY NOTIFIED (as applicable)? (1) ☐ YES (2) ☐ NO (3) ☒ N/A
F122				☒ MET ☐ NOT MET

(c) Standard: Availability of physicians for emergency patient care.

The facility has written procedures, available at each nurses station, that provide for having a physician available to furnish necessary medical care in case of emergency.

FORM SSA-1569 (10-74)

362

Defendants' Exhibit No. 6

NAME OF FACILITY: Four Count Nursing Center 39-5337 0400357

	YES	NO	N/A
F123			
F124			
F125	X		
F126		X	
F127	X		
F128		X	

V. **Nursing services. (405.1124)** — The skilled nursing facility provides 24-hour service by licensed nurses, including the services of a registered nurse at least during the day tour of duty 7 days a week. There is an organized nursing service with a sufficient number of qualified nursing personnel to meet the total nursing needs of all patients. (See §405.1911(a) regarding waiver of the 7-day registered nurse requirement.)

☐ MET ☒ NOT MET

(a) Standard: Director of nursing services.

The director of nursing services is a qualified registered nurse employed full-time

Has, in writing, administrative authority, responsibility, and accountability for the functions, activities, and training of the nursing services staff, and serves only one facility in this capacity.

If the director of nursing services has other institutional responsibilities, a qualified registered nurse serves as assistant so that there is the equivalent of a full-time director of nursing services on duty.

The director of nursing services is responsible for the development and maintenance of nursing service objectives, standards of nursing practice, nursing policy and procedure manuals, written job descriptions for each level of nursing personnel, scheduling of daily rounds to see all patients, methods for coordination of nursing services with other patient services, for recommending the number and levels of nursing personnel to be employed, and nursing staff development. (See 405.1121(h).)

NAME AND REGISTRATION NUMBER OF DIRECTOR OF NURSING:
Mrs. Bernadine Sterner
RN 054293

Nursing Services

EXPLANATORY STATEMENTS

F123 Cross reference F124, 129, 134, 169, 173, 177, 181, 189

F128 A written procedure for cleaning combs and brushes was not available Cross reference F134, 135, 136, 169, 173, 174, 175, 176, 177, 178, 180, 181, 182, 186, 187, 189, 190, 193, 203

363

FORM SSA-1569 (12-74)

22

NAME OF FACILITY: Four Count Nursing Center 39-5337 0400357

	YES	NO	N/A
F129			
F130	X		
F131	X		
F132	X		
F133		X	
F134			
F135		X	
F136		X	

☐ MET ☒ NOT MET

(b) Standard: Charge nurse.

A registered nurse, or a qualified licensed practical (vocational) nurse, is designated as charge nurse by the director of nursing services for each tour of duty

Is responsible for supervision of the total nursing activities in the facility during each tour of duty.

The director of nursing services does not serve as charge nurse in a facility with an average daily total occupancy of 60 or more patients.

The charge nurse delegates responsibility to nursing personnel for the direct nursing care of specific patients during each tour to duty, on the basis of staff qualifications, size, and physical layout of the facility, characteristics of the patient load, and the emotional, social, and nursing care needs of patients.

☐ MET ☒ NOT MET

(c) Standard: Twenty-four-hour nursing service.

The facility provides 24-hour nursing services which are sufficient to meet total nursing needs and which are in accordance with the patient care policies developed as provided in 405.1121(l).

The policies are designed to ensure that each patient receives treatments, medications, and diet as prescribed, and rehabilitative nursing care as needed; receives proper care to prevent decubitus ulcers and deformities, and is kept comfortable, clean, well-groomed, and protected from accident, injury, and infection; and encouraged, assisted, and trained in self care and group activities.

Nursing Services (continued)

EXPLANATORY STATEMENTS

F133 129 Assignment sheets were not available for the 11-7 tour of duty Cross reference F 181, 182

F134, 135, 136 Cross reference F169, 173, 177, 181, 189

364

FORM SSA-1569 (10-74)

23

NAME OF FACILITY: Grun Court Nursing Center 39-5337 6400357

Nursing Services (continued)

	YES	NO	N/A
F137		X	
F138	X		

Nursing personnel, including at least one registered nurse on the day tour of duty 7 days a week, licensed practical (vocational) nurses, nurse aides, orderlies, and ward clerks, are assigned duties consistent with their education and experience, and based on the characteristics of the patient load.

Weekly time schedules are maintained and indicate the number and classifications of nursing personnel including relief personnel, who worked on each unit for each tour of duty.

(If a distinct part certification, in an ICF or uncertified facility, show the staffing for the DP, and if appropriate, the entire facility and explain any sharing of nursing personnel.)

EXPLANATORY STATEMENTS

This facility has Jewish, nursing stations
F131 Cross reference F181, 182

LPN waiver examination

LIST THE NUMBER OF FULL-TIME EQUIVALENTS OF RN'S, LPN'S, AIDES, ORDERLIES ASSIGNED TO NURSING DUTY FROM THE LAST 3 COMPLETE WEEKS AVAILABLE:

SHIFT		17 SUN. T			18 MON. F			19 TUES. S			20 WED. S			21 THURS. M			22 SAT. T			23 SUN. W		
		RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A
DP	DAY																					
ENTIRE FAC.	DAY	4	0/3	19	2	0/4	21	3	0/2	20	3	0/2	21	1	0/4	27	1	0/5	25	2	0/5	26
DP	EVENING																					
ENTIRE FAC.	EVENING	2	0/3	15	1	0/4	16	3	0/2	15	3	0/2	15	2	0/4	19	1	0/3	20	1	0/4	20
DP	NIGHT																					
ENTIRE FAC.	NIGHT	1	0/4	11	2	1/2	10	1	1/2	12	1	1/2	10	1	0/3	13	1	1/3	13	1	1/3	11
		2.6			2.7			2.5			2.5			3.1			3.1			3.1		

Ft. Care Hours

SHIFT		24 SUN. T			25 MON. F			26 TUES. S			27 WED. S			28 THURS. M			29 SAT. T			30 SUN. W		
		RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A
DP	DAY																					
ENTIRE FAC.	DAY	3	0/4	22	2	0/5	22	3	0/3	20	3	0/3	22	5	0/3	22	2	0/3	20	2	0/4	22
DP	EVENING																					
ENTIRE FAC.	EVENING	1	0/4	15	1	0/4	18	1	0/3	20	1	0/3	20	1	0/3	18	1	0/4	18	1	0/4	18
DP	NIGHT																					
ENTIRE FAC.	NIGHT	1	1/2	11	1	1/3	12	1	1/2	8	1	0/4	8	1	0/3	11	2	1/2	12	1	1/2	10
		2.7			2.9			2.6			2.7			2.8			2.7			2.7		

Ft. Care Hours

FORM SSA-1569 (10-74)

24

NAME OF FACILITY: Grun Court Nursing Center 39-5337 6400357

Nursing Services (continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A
F145			
F146			
F147			
F148			
F149			
F150			

SHIFT		3 SUN. T			4 MON. F			5 TUES. S			6 WED. S			7 THURS. M			8 SAT. T			9 SUN. W		
		RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A	RN	PN	A
DP	DAY																					
ENTIRE FAC.	DAY	3	0/4	19	3	0/2	20	2	0/2	20	2	0/2	19	3	0/4	18	3	0/5	20	3	0/4	20
DP	EVENING																					
ENTIRE FAC.	EVENING	1	0/5	13	1	0/4	18	2	0/3	17	2	0/3	18	2	0/4	19	2	0/3	19	1	0/3	19
DP	NIGHT																					
ENTIRE FAC.	NIGHT	1	1/2	12	1	1/2	9	2	0/2	11	1	1/2	10	1	1/3	11	1	1/2	11	1	1/2	11
		2.8			2.5			2.6			2.6			2.7			2.7			2.7		

Ft. Care Hours

Is Director of Nursing included in above schedule?

F151 → 1. ☐ YES 2. ☒ NO

	NUMBER	
F152	190	PATIENT CENSUS ON DATE OF SURVEY.
F153	2	NUMBER OF COMPLETELY BEDFAST PATIENTS.
F154	34	NUMBER OF PATIENTS REQUIRING NO ASSISTANCE WITH AMBULATION
F155	57	NUMBER OF PATIENTS REQUIRING ASSISTANCE WITH AMBULATION (I.E. WHEELCHAIR, WALKER, CANE, ETC.)
F156	15	NUMBER OF PATIENTS REQUIRING FULL ASSISTANCE IN EATING.
F157	49	NUMBER OF PATIENTS REQUIRING SOME ASSISTANCE IN EATING.
F158	11	NUMBER OF PATIENTS WITH INDWELLING CATHETERS
F159	93	NUMBER OF INCONTINENT PATIENTS (BOWEL AND/OR BLADDER).
F160	9	NUMBER OF PATIENTS WITH DECUBITI.
F161	46	NUMBER OF PATIENTS ON INDIVIDUALLY WRITTEN BOWEL AND BLADDER RETRAINING PROGRAM
F162	112	NUMBER OF PATIENTS RECEIVING SPECIAL SKIN CARE
F163	147	NUMBER OF CONFUSED OR DISORIENTED PATIENTS
F164	0	NUMBER OF PATIENTS RECEIVING INTRAVENOUS THERAPY AND/OR BLOOD TRANSFUSION.
F165	92	NUMBER OF BED-TO-CHAIR PATIENTS.

F161 Cross reference F173

PATIENT CENSUS:

F166 MEDICARE	7
F167 MEDICAID	168
F168 OTHER	15

FORM SSA-1569 (10-74)

25

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

	YES	NO	N/A
F169			
F170		X	
F171		X	
F172		X	
F173			
F174		/	
F175		X	
F176		X	
F177			
F178		X	
F179	X		
F180		X	

☐ MET ☒ NOT MET

(d) Standard: Patient care plan.

In coordination with the other patient care services to be provided, a written patient care plan for each patient is developed and maintained by the nursing service consonant with the attending physician's plan of medical care, and is implemented upon admission.

The plan indicates care to be given and goals to be accomplished and which professional service is responsible for each element of care.

The patient care plan is reviewed, evaluated, and updated as necessary by all professional personnel involved in the care of the patient.

☐ MET ☒ NOT MET

(e) Standard: Rehabilitative nursing care.

Nursing personnel are trained in rehabilitative nursing.

The facility has an active program of rehabilitative nursing care which is an integral part of nursing service and is directed toward assisting each patient to achieve and maintain an optimal level of self-care and independence.

Rehabilitative nursing care services are performed daily for those patients who require such service, and are recorded routinely.

☐ MET ☒ NOT MET

(f) Standard: Supervision of patient nutrition.

Nursing personnel are aware of the nutritional needs and food and fluid intake of patients and assist promptly where necessary in the feeding of patients.

A procedure is established to inform the dietetic service of physicians' diet orders and of patients' dietetic problems.

Food and fluid intake of patients is observed, and deviations from normal are recorded and reported to the charge nurse and the physician.

FORM SSA-1569 (10-74) 26

367

Nursing Services (continued)

EXPLANATORY STATEMENTS

F169, 170, 171, 172

Documentation on the pt plans of care is inadequate because of the following:
a) 32 out of 45 current records reviewed lacked activity program evaluations, goals and/or follow-up
b) 45 out of 45 current records reviewed lacked dental evaluation and/or follow-up
c) 28 out of 45 records reviewed lacked evaluation and/or pt counseling by the dietitian
d) 45 out of 45 current records lacked specific immediate and long term goals by the physician
e) 27 out of 45 current records reviewed lacked specific and/or complete nursing plans of care.
f) 18 out of 45 current records reviewed lacked follow up to identify social needs.

F173, 174, 175, 176

Cross reference F 346
See page 26A "a" "c" "e" "f"

F177, 178, 180 Nursing personnel are not aware of the nutritional needs of the pts as evidenced by the following:
a) Pt's [illegible] ordered by the physician, to be fed this pt was observed eating unattended
b) physicians ordered force fluids - there was no [illegible] found
c) Weight chart [illegible] at 11 pm unit only licensed [illegible] - nurses aid not keep

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

	YES	NO	N/A
F173			
F174			
F175			
F176			

☐ MET ☐ NOT MET

(e) Standard: Rehabilitative nursing care.

Nursing personnel are trained in rehabilitative nursing.

The facility has an active program of rehabilitative nursing care which is an integral part of nursing service and is directed toward assisting each patient to achieve and maintain an optimal level of self-care and independence.

Rehabilitative nursing care services are performed daily for those patients who require such service, and are recorded routinely.

368

Nursing Services (continued)

EXPLANATORY STATEMENTS

F173, 174, 175, 176

Rehabilitative and restorative nursing is not being provided in accordance with the needs of individual the patients as evidenced by:
a) patients who incur is bed or in chairs were maintained in good body alignment and positioning
b) documentation of bowel and bladder training programs being followed was lacking
c) forty-seven patients who are incontinent of bowel and/or bladder are not on an individual program for training.
d) lack of documentation of range of motion exercises for stroke patients and amputees.

FORM SSA-1569 (10-74) 26 A

NAME OF FACILITY: Pine Court Nursing Center — 39-5337 — 040357

Nursing Services (continued)

	YES	NO	N/A
F181			
F182		X	
F183		X	
F184	X		
F185	X		
F186		X	
F187		X	
F188	X		
F189			
F190		X	
F191	X		
F192	X		
F193		X	
F194	X		

369

☐ MET ☒ NOT MET

(g) Standard: Administration of drugs.

Drugs and biologicals are administered only by physicians, licensed nursing personnel, or by other personnel who have completed a State-approved training program in medication administration.

Procedures are established by the pharmaceutical services committee (see 405.1127(d)) to ensure that drugs are checked against physicians' orders.

The patient is identified prior to administration of a drug.

Each patient has an individual medication record.

The dose of a drug administered to that patient is properly recorded therein by the person who administers the drug.

Drugs and biologicals are administered as soon as possible after doses are prepared.

Administered by the same person who prepared the doses for administration, except under single unit dose package distribution systems. (See 405.1101(h).)

☐ MET ☒ NOT MET

(h) Standard: Conformance with physicians' drug orders.

Drugs are administered in accordance with written orders of the attending physician.

Drugs not specifically limited as to time or number of doses when ordered are controlled by automatic stop orders or other methods in accordance with written policies.

Physicians' verbal orders for drugs are given only to a licensed nurse, pharmacist, or physician and are immediately recorded and signed by the person receiving the order. (Verbal orders for Schedule II drugs are permitted only in the case of a bona fide emergency situation.)

Such orders are countersigned by the attending physician within 48 hours.

The attending physician is notified of an automatic stop order prior to the last dose so that the physician may decide if the administration of the drug or biological is to be continued or altered.

EXPLANATORY STATEMENTS

F181, 182 Licensed practical nurses by nurses who have not passed a State approved medication course are administering medication.

F183 The following medications were ordered by the physician but were not available
a) Tylenol
b) Phenergan (Sup)
c) Calicaine powder, d) Band d ointment
e) Darvon Compound 65 mg
f) Orenic
g) Kaopectate and f) Milk of Magnesia

F186 Five submitted medication records lacked consistent charting of medications which were ordered (cross reference F346 "G" attached) F187 "Medications for administration to the patients on the lifted floor were observed pre-packed at 9:30 am

F189, 190 Cross reference with F183

F193 Twenty-two (22) out of forty-five (45) records reviewed lacked verbal orders signed within 48 hours CX 346

FORM SSA-1569 (10-74)

27

NAME OF FACILITY: Pine Court Nursing Center — 39-5337 — 040357

Nursing Services (continued)

	YES	NO	N/A
F195			
F196			
F197			
F198			
F199			
F200			
F201			
F202	X		
F203		X	
F204	X		
F205	X		
F206	X		

370

Stop-order policies for following are:

Narcotics 5 days
Anti-coagulants 14 days
Antibiotics 5 days
Barbituates 30 days
Review of (No.) 49 charts indicates stop-order policies are observed:
1. ☒ YES 2. ☐ NO

☒ MET ☐ NOT MET

(i) Standard: Storage of drugs and biologicals.

Procedures for storing and disposing of drugs and biologicals are established by the pharmaceutical services committee.

In accordance with State and Federal laws, all drugs and biologicals, are stored in locked compartments under proper temperature controls.

Only authorized personnel have access to the keys.

Separately locked, permanently affixed compartments are provided for storage of controlled drugs listed in Schedule II of the Comprehensive Drug Abuse Prevention & Control Act of 1970 and other drugs subject to abuse, except under single unit package drug distribution systems in which the quantity stored is minimal and a missing dose can be readily detected.

An emergency medication kit approved by the pharmaceutical services committee is kept readily available.

EXPLANATORY STATEMENTS

F203 The following medications were found at patients bedsides:
a) 2 cans of Caldisene powder
b) Valisone ointment - 1 tube
c) Calamine lotion - 1 bottle
d) 2 tubes of Zinc oxide
e) Alcohol - 1 bottle
f) mineral oil - 1 bottle
g) Neosporin spray
h) Arpuration-N - 1 tube
i) Sperdric Rx - 1 bottle

FORM SSA-1569 (10-74)

28

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Dietetic Services

EXPLANATORY STATEMENTS

	YES	NO	N/A
F207			

☒ MET ☐ NOT MET

VI. Dietetic services. (405.1125) — The skilled nursing facility provides a hygienic dietetic service that meets the daily nutritional needs of patients, ensures that special dietary needs are met, and provides palatable and attractive meals. A facility that has a contract with an outside food management company may be found to be in compliance with this condition provided the facility and/or company meets the standards listed herein.

F208 ☐ MET ☒ NOT MET

(a) Standard: Staffing.

F209		X	
F210	X		
F211	X		
F212	X		
F213		X	

Overall supervisory responsibility for the dietetic service is assigned to a full-time qualified dietetic service supervisor.

If the dietetic service supervisor is not a qualified dietitian the dietetic service supervisor functions with frequent, regularly scheduled consultation from a person so qualified. (See 405.1121(i).)

In addition, the facility employs sufficient supportive personnel competent to carry out the functions of the dietetic service.

Food service personnel are on duty daily over a period of 12 or more hours.

If consultant dietetic services are used, the consultant's visits are at appropriate times, and of sufficient duration and frequency to provide continuing liaison with medical and nursing staffs, advice to the administrator, patient counseling, guidance to the supervisor and staff of the dietetic service, approval of all menus, and participation in development or revision of dietetic policies and procedures and in planning and conducting inservice education programs (see 405.1121(h).)

F209 The food service supervisor is not a full-time employee of the facility.

F213 Time spent in the facility by the consulting dietitian is not sufficient to provide adequate nutritional counseling for 190 patients & continuing liaison with medical and nursing staffs.

371

FORM SSA-1569 (10-74)

29

454a

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Dietetic Services (Continued)

EXPLANATORY STATEMENTS

NAME OF PERSON RESPONSIBLE FOR DIETARY SERVICE: Mr. William Fagan

QUALIFICATIONS: Completed Food Service Supervisor Course (90 hours) at Burlington County Vocational and Technical School 4/76

IF ABOVE PERSON IS NOT A QUALIFIED DIETITIAN, GIVE NAME OF CONSULTANT DIETITIAN: Mrs. Beatrice Lucas

FREQUENCY OF CONSULTATION: 8 -> 16 HOURS PER ~~WEEK~~ MONTH

CONSULTANT'S ADA NUMBER, IF ANY: R333026

F214

GIVE FULL TIME EQUIVALENTS

SHIFT 1	POSITION	S	M	T	W	T	F	S
HOURS OF SHIFT	6:00 AM TO 2:30 PM	3/6	3/7	3/8	3/9	3/10	3/11	3/12
F215	COOKS	1	1	1	1	1	1	1
F216 TO (E.G. 6 AM TO 1 PM)	HELPERS	3	3	3	3	3	3	3

SHIFT 2	POSITION	S	M	T	W	T	F	S
HOURS OF SHIFT	1:00 PM TO 7:30 PM							
F217	COOKS	1	1	1	1	1	1	1
F218 TO	HELPERS	3	4	3	4	3	4	3

F219 IF SUPERVISOR IS ALSO COOK, INDICATE NUMBER OF HOURS DEVOTED TO SUPERVISION. (DO NOT INCLUDE THESE HOURS IN ABOVE CHART.)

F220 CONTRACT WITH FOOD MANAGEMENT COMPANY: (1) ☒ NONE (2) ☐ ALL OF SERVICE (3) ☐ PART OF SERVICE

DESCRIBE SCOPE OF SERVICE PROVIDED UNDER CONTRACT: N/A

372

FORM SSA-1569 (10-74)

30

455a

Defendants' Exhibit No. 6

NAME OF FACILITY: Thorn Court Nursing Center 39-5337 0400357

	YES	NO	N/A	QUALIFICATIONS OF CONTRACT DIETITIAN:
				N/A

F221 → ☐ MET ☒ NOT MET

(b) Standard: Menus and nutritional adequacy.

Menus are planned and followed to meet nutritional needs of patients in accordance with physicians' orders and, to the extent medically possible, in accordance with the recommended dietary allowances of the Food and Nutrition Board of the National Research Council National Academy of Sciences.

F222 → ☐ MET ☒ NOT MET

(c) Standard: Therapeutic diets.

	YES	NO	N/A
F223	X		
F224		X	
F225	X		

Therapeutic diets are prescribed by the attending physician.

Therapeutic menus are planned in writing, and prepared and served as ordered, with supervision or consultation from the dietitian and advice from the physician whenever necessary.

A current therapeutic diet manual approved by the dietitian is readily available to attending physicians and nursing and dietetic service personnel.

NAME OF DIET MANUAL(S) AND DATE PUBLISHED: Thorn Court Diet Manual - 1976

F226 → NUMBER OF REGULAR DIETS: 124

F227 → NUMBER OF THERAPEUTIC DIETS: 66

F228 → NUMBER OF MECHANICALLY ALTERED DIETS: 23

F229 → NUMBER OF TUBE FEEDINGS: 0

373

FORM SSA-1569 (10-74)

Dietetic Services (Continued)

EXPLANATORY STATEMENTS

F221 F224 Observation of the meal service revealed:

a) the luncheon meal on one day of the survey was not served as planned on the menu, i.e. lettuce and tomato was not served and a substitute of equivalent nutritional value was not provided

b) a 1500 calorie diet was not served the proper sherbet as planned on the menu.

F222 F224 The tray identification system established to insure that each patient receives his diet as ordered is not being properly implemented, i.e. it was observed that tray identification cards are removed prior to serving patient trays not allowing for identification of special diets when serving beverages and desserts

31

NAME OF FACILITY: Thorn Court Nursing Center 39-5337 0400357

	YES	NO	N/A
F230			
F231	X		
F232	X		

F230 → ☒ MET ☐ NOT MET

(d) Standard: Frequency of meals.

At least three meals or their equivalent are served daily, at regular hours, with not more than a 14-hour span between substantial evening meal and breakfast.

To the extent medically possible, bedtime nourishments are offered routinely to all patients.

LIST THE TIMES MEALS ARE SERVED

F233 → BREAKFAST 7:30 AM

F234 → LUNCH 12:00 NOON

F235 → DINNER 5:30 PM

F236 → OTHER 4:00 PM EVENING NOURISHMENT

F237 → ☐ MET ☒ NOT MET

(e) Standard: Preparation and service of food.

	YES	NO	N/A
F238	X		
F239		X	

Foods are prepared by methods that conserve nutritive value, flavor, and appearance, and are attractively served at the proper temperatures and in a form to meet individual needs.

If a patient refuses food served, appropriate substitutes of similar nutritive value are offered.

F240 → ☒ MET ☐ NOT MET

(f) Standard: Hygiene of staff.

	YES	NO	N/A
F241	X		
F242	X		
F243	X		

Dietetic service personnel are free of communicable diseases

They practice hygienic food-handling techniques.

In the event food service employees are assigned duties outside the dietetic service, these duties do not interfere with the sanitation, safety, or time required for dietetic work assignments. (See 405.1121(g).)

374

FORM SSA-1569 (10-74)

Dietetic Services (Continued)

EXPLANATORY STATEMENTS

F237 F239 There was no evidence that substitutes were offered to patients who were observed refusing food.

32

NAME OF FACILITY: Sioux Court Nursing Center 39-5337 040357

Dietetic Services (Continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A
F244 →			
F245	X		
F246	X		
F247	X		
F248	X		

☒ MET ☐ NOT MET

(g) Standard: Sanitary conditions.

Food is procured from sources approved or considered satisfactory by Federal, State, or local authorities.

Stored, prepared, distributed, and served under sanitary conditions.

Waste is disposed of properly.

Written reports of inspections by State and local health authorities are on file at the facility, with notation made of action taken by the facility to comply with any recommendations.

DCK - 12/3/76

375

FORM SSA-1569 (10-74)

33

458a

Defendants' Exhibit No. 6

NAME OF FACILITY: Sioux Court Nursing Center 39-5337 040357

Specialized Rehabilitative Services

EXPLANATORY STATEMENTS

	YES	NO	N/A
F249			
F250 →			
F251	X		
F252	X		
F253	X		

☒ MET ☐ NOT MET

11. Specialized rehabilitative services. (405.1126) — In addition to rehabilitative nursing (405.1124(e)), the skilled nursing facility provides, or arranges for, under written agreement, specialized rehabilitative services by qualified personnel (i.e., physical therapy, speech pathology and audiology, and occupational therapy) as needed by patients to improve and maintain functioning. These services are provided upon the written order of the patient's attending physician. Safe and adequate space and equipment are available, commensurate with the services offered. If the facility does not offer such services directly, it does not admit nor retain patients in need of this care unless provision is made for such services under arrangement with qualified outside resources under which the facility assumes professional responsibilities for the services rendered. (See 405.1121(i).)

☒ MET ☐ NOT MET

(a) Standard: Organization and staffing.

Specialized rehabilitative services are provided, in accordance with accepted professional practices, by qualified therapists or by qualified assistants or other supportive personnel under the supervision of qualified therapists.

Other rehabilitative services also may be provided, but must be in a facility where all rehabilitative services are provided through an organized rehabilitative service under the supervision of a physician qualified in physical medicine who determines the goals and limitations of these services and assigns duties appropriate to the training and experience of those providing such services.

Written administrative and patient care policies and procedures are developed for rehabilitative services by appropriate therapists and representatives of the medical, administrative, and nursing staffs.

List Rehabilitative Services:

TYPE OF SERVICE	PROVIDED BY FACILITY	OUTSIDE RESOURCE
Physical Therapy	X	
Speech Therapy		X

376

FORM SSA-1569 (10-74)

34

Defendants' Exhibit No. 6

459a

NAME OF FACILITY: Penn Court Nursing Center 34-5337 0400357

Specialized Rehabilitative Services (Continued)

	YES	NO	N/A		EXPLANATORY STATEMENTS
F254				☒ MET ☐ NOT MET	
F255	X			Rehabilitative services are provided under a written plan of care, initiated by the attending physician and developed in consultation with appropriate therapist(s) and the nursing service.	
F256	X			Therapy is provided only upon written orders of the attending physician.	
F257	X			A report of the patient's progress is communicated to the attending physician within 2 weeks of the initiation of specialized rehabilitative services.	
F258	X			The patient's progress is thereafter reviewed regularly, and the plan of rehabilitative care is reevaluated as necessary, but at least every 30 days, by the physician and the therapist.	
F259				☒ MET ☐ NOT MET	
				(c) Standard: Documentation of services.	
				The physicians' orders, the plan of rehabilitative care, services rendered, evaluations of progress, and other pertinent information are recorded in the patient's medical record, and are dated and signed by the physician ordering the service and the person who provided the service.	
F260				☒ MET ☐ NOT MET	
				(d) Standard: Qualifying to provide outpatient physical therapy services.	
				If the facility provides outpatient physical therapy services, it meets the applicable health and safety regulations pertaining to such services as are included in Subpart Q of this part. (See 405.1719; 405.1720; 405.1722(a) and (b) (1), (2), (3) (i), (4), (5), (6), (7), and (8); and 405.1725.)	
				Facility provides:	
F261				Outpatient physical therapy (1) ☐ YES (2) ☒ NO	
F262				Speech therapy (1) ☐ YES (2) ☒ NO	

377

FORM SSA-1569 (10-74)

35

460a

Defendants' Exhibit No. 6

NAME OF FACILITY: Penn Court Nursing Center 34-5337 0400357

Pharmaceutical Services

	YES	NO	N/A		EXPLANATORY STATEMENTS
F263				☐ MET ☒ NOT MET	
				VIII. Pharmaceutical services. (405.1127) — The skilled nursing facility provides appropriate methods and procedures for the dispensing and administering of drugs and biologicals. Whether drugs and biologicals are obtained from community or institutional pharmacists or stocked by the facility, the facility is responsible for providing such drugs and biologicals for its patients, insofar as they are covered under the programs, and for ensuring that pharmaceutical services are provided in accordance with accepted professional principles and appropriate Federal, State, and local laws. (See 405.1124 (g), (h), and (i).)	
F264				☐ MET ☒ NOT MET	
				(a) Standard: Supervision of services.	
F265	X			The pharmaceutical services are under the general supervision of a qualified pharmacist	
F266	X			The pharmacist is responsible to the administrative staff for developing, coordinating, and supervising all pharmaceutical services.	
F267		X		The pharmacist (if not a full-time employee) devotes a sufficient number of hours, based upon the needs of the facility, during regularly scheduled visits to carry out these responsibilities.	
F268		X		The pharmacist reviews the drug regimen of each patient at least monthly, and reports any irregularities to the medical director and administrator.	
F269	X			The pharmacist submits a written report at least quarterly to the pharmaceutical services committee on the status of the facility's pharmaceutical service and staff performance.	
				NAME OF PHARMACIST: William Franklin A. Hess RP 020264	
F270				(1) ☐ FULL TIME (2) ☒ PART TIME	
F271				IF PART TIME, HOURS PER MONTH SPENT IN FACILITY: 8	

F263, 264
F267 Cross reference F183, 186

F268 Cross reference F183

S. D. Hess Drugs
Pharmacy Permit # 412170
DEA # AH 0480974

378

FORM SSA-1569 (10-74)

36

461a

Defendants' Exhibit No. 6

NAME OF FACILITY: Ibex Court Nursing Center 34-5337 040357

	YES	NO	N/A
F272			
F273	X		
F274	X		
F275		X	
F276	X		
F277		X	

☐ MET ☒ NOT MET

(b) Standard: Control and accountability.

The pharmaceutical service has procedures for control and accountability of all drugs and biologicals throughout the facility.

Only approved drugs and biologicals are used in the facility.

They are dispensed in compliance with Federal and State laws.

Records of receipt and disposition of all controlled drugs are maintained in sufficient detail to enable an accurate reconciliation.

The pharmacist determines that drug records are in order and that an account of all controlled drugs is maintained and reconciled.

NAME AND POSITION OF PERSON RESPONSIBLE FOR CONTROLLED DRUG RECORD: Mrs B. Stamer L.N./D.O.N

F278 ☐ MET ☒ NOT MET

(c) Standard: Labeling of drugs and biologicals.

The labeling of drugs and biologicals is based on currently accepted professional principles and includes the appropriate accessory and cautionary instructions as well as the expiration date when applicable.

F279 ☐ MET ☒ NOT MET

(d) Standard: Pharmaceutical services committee.

F280	X		
F281	X		
F282		X	
F283	X		

A pharmaceutical services committee (or its equivalent) develops written policies and procedures for safe and effective drug therapy, distribution, control and use.

The committee is comprised of at least the pharmacist, the director of nursing services, the administrator, and one physician.

The committee oversees pharmaceutical service in the facility, makes recommendations for improvement, and monitors the service to ensure its accuracy and adequacy.

The committee meets at least quarterly and documents its activities, findings and recommendations.

Pharmaceutical Services (Continued)

EXPLANATORY STATEMENTS

272 275 F278 The following medication were improperly labeled:
a) Maalox was ordered qid - did not have label on
b) Lanolin was labeled T 40's/day - order was 2 mg T.i.d
c) Lasix was ordered 2 orang. juice - not noted on label
d) Inderal - ordered Tab i.t.d & the PAC label stated only P.R.N.
e) Calamine lotion - only qty named
f) 2 tubes of zinc oxide - no label

F279 Cross reference F 181, 182, 183, 184, 187, 193, 203

F282 A nurse was observed administering medications without the medication cardex

FORM SSA-1569 (10-74)

379

37

NAME OF FACILITY: Ibex Court Nursing Center 34-5337 040357

Membership of pharmaceutical services committee:

NAME	POSITION
Dr. B. Chase, D.O.	Medical Director
Franklin Ware, R.P.	Consultant Pharmacist
Dr. Steingart, M.D.	
Dr. A. Faiuli, M.D.	
Dr. M. Cohen, M.D.	
Mr. Donald Lucas, Administrator	

FREQUENCY OF MEETINGS: (MONTHLY, QUARTERLY, ETC.)

F284 1. ☐ WEEKLY 2. ☐ MONTHLY 3. ☒ QUARTERLY

DATE OF LAST MEETING:

F285 12/15/76

Pharmaceutical Services (Continued)

EXPLANATORY STATEMENTS

Mrs. B. Stamer, D.O.N.
Mrs. B.A. Shemfelt, V.P.
Mrs. C. Cassidy, R.N.

FORM SSA-1569 (10-74)

380

38

NAME OF FACILITY: Saint Janet Nursing Center 39-5337 0460357

Laboratory and Radiological Services

	YES	NO	N/A
F286 →			
F287 →			
F288			X
F289	X		
F290		X	
F291		X	
F292	X		
F293		X	

381

☒ MET ☐ NOT MET

IX. **Laboratory and radiologic services (405.1128)** — The skilled nursing facility has provision for promptly obtaining required laboratory, X-ray, and other diagnostic services.

☒ MET ☐ NOT MET

(a) Standard: Provision for services.

If the facility provides its own laboratory and X-ray services, these meet the applicable conditions established for certification of hospitals that are contained in 405.1028 and 405.1029, respectively.

If the facility itself does not provide such services, arrangements are made for obtaining these services from a physician's office, a participating hospital or skilled nursing facility, or a portable X-ray supplier or independent laboratory which is approved to provide these services under the program.

All such services are provided only on the orders of the attending physician.

The attending physician is notified promptly of the findings.

The facility assists the patient, if necessary, in arranging for transportation to and from the source of service.

Signed and dated reports of a clinical laboratory, X-ray, and other diagnostic services are filed with the patient's medical record.

EXPLANATORY STATEMENTS

F290 Physicians ordered tests were not available for 24 hr urinalysis, X-Ray and per laboratory protocol test

F291 Documentation of Physicians being informed of abnormal laboratory and/or X-Ray findings was not available on the medical record

F293 Serum X-Ray or laboratory tests were ordered by the physician with no report available

F290, 291, 293 Cross reference F 346 "f"

FORM SSA-1569 (10-74)

39

NAME OF FACILITY: [illegible] Nursing Center 39-5337 0460357

Laboratory and Radiological Services (Continued)

	YES	NO	N/A
F294 →			
F295 →			

382

If outside resource used, list name and provider number:

LABORATORY: Dana Labs
PROVIDER NO.: 39-8109

X-RAY: Professional Health Services
PROVIDER NO.: 39-9800

EXPLANATORY STATEMENTS

FORM SSA-1569 (10-74)

40

NAME OF FACILITY: Texas Court Nursing Center 39-5337 0400357

	YES	NO	N/A
F300			

☒ MET ☐ NOT MET

X. **Dental services (405.1129)** — The skilled nursing facility has satisfactory arrangements to assist patients to obtain routine and emergency dental care (See 405.1121(i).) (The basic Hospital Insurance Program does not cover the services of a dentist in a skilled nursing facility in connection with the care, treatment, filling, removal, or replacement of teeth or structures supporting the teeth; and only certain oral surgery is included in the Supplemental Medical Insurance Program.)

F301			X
F302		X	
F303	X		

☐ MET ☒ NOT MET

(a) Standard: Advisory dentist.

An advisory dentist participates in the staff development program for nursing and other appropriate personnel (see 405.1121(h)).

The advisory dentist recommends oral hygiene policies and practices for the care of patients.

NAME OF ADVISORY DENTIST

Maier Berkowitz, DDS

F304	X		
F305	X		
F306	X		
F307	X		

☒ MET ☐ NOT MET

(b) Standard: Arrangements for outside services.

The facility has a cooperative agreement with a dental service.

Maintains a list of dentists in the community for patients who do not have a private dentist.

The facility assists the patient, if necessary, in arranging for transportation to and from the dentist's office.

Dental Services

EXPLANATORY STATEMENTS

F301, 302
Documentation of the advisory dentist participating in staff development was not available

Jefferson Dental Clinic for dentures

FORM SSA-1569 (10-74)

42

383

Defendants' Exhibit No. 6

466a

NAME OF FACILITY: Texas Court Nursing Center 39-5337 0400357

	YES	NO	N/A
F296			

☒ MET ☐ NOT MET

(b) Standard: Blood and blood products.

F297			X
F298			X
F299			X

Blood handling and storage facilities are safe, adequate, and properly supervised.

If the facility provides for maintaining and transfusing blood and blood products, it meets the conditions established for certification of hospitals that are contained in 405.1028(j).

If the facility does not provide its own facilities but does provide transfusion services alone, it meets at least the requirements of 405.1028(j) (1), (3), (4), (6), and (9).

IF OUTSIDE RESOURCE USED, LIST NAME.

Physician's Reference

Laboratory and Radiological Services (Continued)

EXPLANATORY STATEMENTS

FORM SSA-1569 (10-74)

41

384

Defendants' Exhibit No. 6

467a

NAME OF FACILITY: Penn Court Nursing Center 34-5337 04CC357

Social Services

EXPLANATORY STATEMENTS

	YES	NO	N/A
F308 →			

☒ MET ☐ NOT MET

XI. Social services (405.1130) — The skilled nursing facility has satisfactory arrangements for identifying the medically related social and emotional needs of the patient. It is not mandatory that the skilled nursing facility itself provide social services in order to participate in the program. If the facility does not provide social services, it has written procedures for referring patients in need of social services to appropriate social agencies. If social services are offered by the facility, they are provided under a clearly defined plan, by qualified persons, to assist each patient to adjust to the social and emotional aspects of the patient's illness, treatment, and stay in the facility.

385

F309 →			
F310	X		
F311		X	
F312	X		
F313	X		

☒ MET ☐ NOT MET

(a) Standard: Social service functions.

The medically related social service and emotional needs of the patient are identified.

Services are provided to meet them, either by qualified staff of the facility, or by referral, based on established procedures, to appropriate social agencies.

If financial assistance is indicated, arrangements are made promptly for referral to an appropriate agency.

The patient and family or responsible person are fully informed of the patient's personal and property rights.

3/3/82

3/3/82 F311 cross reference F316

FORM SSA-1569 (10-74)

43

Defendants' Exhibit No. 6

NAME OF FACILITY: Penn Court Nursing Center 34-5337 04CC357

Social Services (Continued)

EXPLANATORY STATEMENTS

	YES	NO	N/A
F314 →			
F315	X		
F316		X	
F317	X		
F318	X		

☒ MET ☐ NOT MET

(b) Standard: Staffing.

If the facility offers social services, a member of the staff of the facility is designated as responsible for social services.

If the designated person is not a qualified social worker, the facility has a written agreement with a qualified social worker or recognized social agency for consultation and assistance on a regularly scheduled basis. (See 405.1121(i).)

F316 The consultant for F319 social services is not qualified.

The social service also has sufficient supportive personnel to meet patient needs

Facilities are adequate for social service personnel, easily accessible to patients and medical and other staff, and ensure privacy for interviews.

386

NAME OF PERSON RESPONSIBLE FOR SOCIAL SERVICES: Mrs Debra Goldstein

If not qualified social worker, qualified consultant or social agency provides assistance

F319 → (1) ☐ YES (2) ☒ NO

IF SOCIAL AGENCY USED, GIVE NAME:

F320 →			
F321	X		
F322		X	
F323	X		

☒ MET ☐ NOT MET

(c) Standard: Records and confidentiality of social data.

Records of pertinent social data about personal and family problems medically related to the patient's illness and care, and of action taken to meet the patient's needs, are maintained in the patient's medical record.

If social services are provided by an outside resource, a record is maintained of each referral to such resource.

Policies and procedures are established for ensuring the confidentiality of all patients' social information.

FORM SSA-1569 (10-74)

44

Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 99-5337 0400357

	YES	NO	N/A
F324			
F325			
F326	X		
F327			X
F328			
F329			
F330			
F331			X
F332	X		
F333	X		
F334	X		

XII. Patient activities (405.1131) — The skilled nursing facility provides for an activities program, appropriate to the needs and interests of each patient, to encourage self care, resumption of normal activities, and maintenance of an optimal level of psychosocial functioning.

F325 — X MET ☐ NOT MET

(a) Standard: Responsibility for patient activities.

A member of the facility's staff is designated as responsible for the patient activities program.

If not a qualified patient activities coordinator, this staff member functions with frequent, regularly scheduled consultation from a person so qualified. (See 405.1121(i).)

NAME OF PATIENT ACTIVITIES COORDINATOR: Joyce Parker

If not qualified, consultation is provided

F328 — (1) X YES (2) ☐ NO

NAME OF CONSULTANT: n a

F329 — Frequency of consultation n a hours per month

F330 — ☐ MET X NOT MET

(b) Standard: Patient activities program.

Provision is made for an ongoing program of meaningful activities appropriate to the needs and interests of patients, designed to promote opportunities for engaging in normal pursuits, including religious activities of their choice, if any.

Each patient's activities program is approved by the patient's attending physician as not in conflict with the treatment plan.

The activities are designed to promote the physical, social and mental well-being of the patients.

The facility makes available adequate space and a variety of supplies and equipment to satisfy the individual interests of patients (see 405.1134(g)).

Patient Activities

EXPLANATORY STATEMENTS

B.I. from temple - in Lerveation with emphesis on therapeutics

F330 F331 the activities program is not meeting the needs of all the patients as evidenced by the fact that patients were observed setting idly in lounge areas and bedrooms on all floors

FORM SSA-1569 (13-74)

45

387

470a Defendants' Exhibit No. 6

NAME OF FACILITY: Town Court Nursing Center 99-5337 0400357

	YES	NO	N/A
F335			
F336			
F337	X		
F338	X		
F339	X		
F340			
F341			
F342			
F343			

XIII. Medical records (405.1132) — The facility maintains clinical (medical) records on all patients in accordance with accepted professional standards and practices. The medical record service has sufficient staff, facilities, and equipment to provide medical records that are completely and accurately documented, readily accessible, and systematically organized to facilitate retrieving and compiling information.

F335 — ☐ MET X NOT MET

F336 — X MET ☐ NOT MET

(a) Standard: Staffing.

Overall supervisory responsibility for the medical record service is assigned to a full-time employee of the facility.

The facility also employs sufficient supportive personnel competent to carry out the functions of the medical record service.

If the medical record supervisor is not a qualified medical record practitioner, this person functions with consultation from a person so qualified. (See 405.1121(i).)

NAME AND TITLE OF FULL TIME PERSON RESPONSIBLE FOR MEDICAL RECORDS: Patti Hayes - Secretary

If not qualified, consultation is provided

F340 — (1) X YES (2) ☐ NO

F341 — Frequency of consultation unable to determine. hours per month

NAME AND TITLE OF CONSULTANT: Lucille Weslein

F342 — (1) X ART 3974 (2) ☐ RRA

F343 — X MET ☐ NOT MET

(b) Standard: Protection of medical record information.

The facility safeguards medical record information against loss, destruction, or unauthorized use.

Medical Records

EXPLANATORY STATEMENTS

FORM SSA-1569 (10-72)

46

388

Defendants' Exhibit No. 6 471a

NAME OF FACILITY: [illegible] Court Nursing Center 39-5337 6400357

	YES	NO	N/A	
F344				☐ MET ☒ NOT MET

(c) Standard: Content.

The medical record contains sufficient information to identify the patient clearly, to justify the diagnosis and treatment, and to document the results accurately.

All medical records contain the following general categories of data: documented evidence of assessment of the needs of the patient, of establishment of an appropriate plan of treatment, and of the care and services provided; authentication of hospital diagnoses (discharge summary, report from patient's attending physician, or transfer form), identification data and consent forms, medical and nursing history of patient, report of physical examination(s), diagnostic and therapeutic orders, observations and progress notes, reports of treatments and clinical findings, and discharge summary including final diagnosis and prognosis.

F345		X
F346		X
F347	NUMBER OF RECORDS EXAMINED	59
F348	CURRENT INPATIENT	45
F349	DISCHARGED PATIENTS	14
	METHOD OF SELECTION OF CASES FOR EXAMINATION	Medicare, Medicaid, diagnosis, death, discharges, dementia
	LIST TYPE OF DATA WHICH IS LACKING	discharge summaries
	ON HOW MANY RECORDS	14

F350	☐ MET	☒ NOT MET

(d) Standard: Physician documentation.

Only physicians enter or authenticate in medical records opinions that require medical judgment (in accordance with medical staff bylaws, rules, and regulations, if applicable).

All physicians sign their entries into the medical record.

F351	X	
F352		X

FORM SSA-1569 (10-74)

389

Medical Records (Continued)

EXPLANATORY STATEMENTS

F335
F344
F345
F346 A review of forty-five (45) ex-patient medical records revealed the following
(1) Substantial (17) records contained inadequate or incomplete assessment of pt's needs by the physician and/or nursing.
(2) forty-five (45) records lacked interdisciplinary assessment of patients for discharge planning
(2) forty-five (45) records lacked pt plans of care which reflect the current status of the pt and/or progress toward stated goals
(2) Consent forms on 4 records were not signed by the patient or guardian
(2) 2 records lacked nursing histories
(6) Monthly nursing summaries were lacking as follows:
1) 28 records lacked summaries by 7-3 nsg personnel
2) 12 records lacked summaries by 3-11 shift personnel
3) 11 records lacked summaries by 11-7 shift personnel
(8) eighteen (18) records lacked one or more of the following categories of information
1) diagnostic and/or therapeutic orders
2) observations and/or progress notes
3) reports of treatments and/or clinical findings

F352 F350 cross reference F193

NAME OF FACILITY: [illegible] Court Nursing Center 39-5337 6400357

	YES	NO	N/A	
F353				☐ MET ☒ NOT MET

(e) Standard: Completion of records and centralization of reports.

Current medical records and those of discharged patients are completed promptly.

All clinical information pertaining to a patient's stay is centralized in the patient's medical record.

F354	✓	
F355	X	
F356	☒ MET	☐ NOT MET

(f) Standard: Retention and preservation.

Medical records are retained for a period of time not less than that determined by the respective State statute, the statute of limitations in the State, or 7 years from the date of discharge in the absence of a State statute, or, in the case of a minor, 3 years after the patient becomes of age under State law.

F357	☒ MET	☐ NOT MET

(g) Standard: Indexes.

Patients' medical records are indexed according to name of patient and final diagnoses to facilitate acquisition of statistical medical information and retrieval of records for research or administrative action.

F358	☒ MET	☐ NOT MET

(h) Standard: Location and facilities.

The facility maintains adequate facilities and equipment, conveniently located, to provide efficient processing of medical records (reviewing, indexing, filing, and prompt retrieval).

FORM SSA-1569 (11-74)

48

390

Medical Records (Continued)

EXPLANATORY STATEMENTS

F353, 354, 355
Fourteen out of fourteen closed medical records reviewed lacked discharge summaries by the physician
Cross reference F346

NAME OF FACILITY: Penn Court Nursing Center 39-5337 0460357

	YES	NO	N/A	
				Any skilled nursing facility which does not have such agreement in effect, but which is found by a State agency (of the State in which such facility is situated) with which an agreement under section 1864 is in effect (or, in the case of a State in which no such agency has an agreement under 1864, by the Secretary) to have attempted in good faith to enter into such an agreement with a hospital sufficiently close to the facility to make feasible the transfer between them of patients and the information referred to in paragraph (a)(2) of this section, shall be considered to have such an agreement in effect if and for so long as such agency (or the Secretary, as the case may be) finds that to do so is in the public interest and essential to ensuring skilled nursing facility services for persons in the community who are eligible for payments with respect to such services under the programs.
391				NAME OF HOSPITAL: St. Agnes Hospital
F365 →				HOSPITAL PROVIDER NO.: 39-0194

Transfer Agreement (Continued)

EXPLANATORY STATEMENTS

FORM SSA-1569 (10-74)

50

NAME OF FACILITY: Penn Court Nursing Center 39-5337 0460357

	YES	NO	N/A	
F367 →				X MET ☐ NOT MET
F368				*(b) Standard: Emergency power.*
	X			The facility provides an emergency source of electrical power necessary to protect the health and safety of patients in the event the normal electrical supply is interrupted.
F369				The emergency electrical power system must supply power adequate at least for lighting in all means of egress; equipment to maintain fire detection, alarm, and extinguishing systems; and life safety support systems.
	X			Where life support systems are used, emergency electrical service is provided by an emergency generator located on the premises.
F370				
	X			
F371 →				X MET ☐ NOT MET
				(c) Standard: Facilities for physically handicapped.
F372				
	X			The facility is accessible to, and functional for, patients, personnel, and the public.
F373				
392				All necessary accommodations are made to meet the needs of persons with semiambulatory disabilities, sight and hearing disabilities, disabilities of coordination, as well as other disabilities, in accordance with the American National Standards Institute (ANSI) Standard No. A117.1, American Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped.
	X			
				The Secretary (or in the case of a facility participating as a skilled nursing facility under XIX only, the survey agency — see 249.33(a)(1)(i) of this title) may waive in existing buildings, for such periods as deemed appropriate, specific provisions of ANSI Standard No. A117.1 which, if rigidly enforced, would result in unreasonable hardship upon the facility, but only if such waiver will not adversely affect the health and safety of patients.
F374				
	X			4.1 Are the facility grounds graded to the same level as the primary entrance so that the building is accessible to the physically handicapped?

Physical Environment (Continued)

EXPLANATORY STATEMENTS

FORM SSA-1569 (10-74)

52

Defendants' Exhibit No. 6

NAME OF FACILITY: Glen Court Nursing Center 39-5337 0460357

	YES	NO	N/A	
F359				X MET ☐ NOT MET

XIV. Transfer agreement (405.1133) — The skilled nursing facility has in effect a transfer agreement with one or more hospitals approved for participation under the programs, which provides the basis for effective working arrangements under which inpatient hospital care or other hospital services are available promptly to the facility's patients when needed. (A facility that has been unable to establish a transfer agreement with the hospital(s) in the community or service area after documented attempts to do so is considered to have such an agreement in effect.)

F360				X MET ☐ NOT MET
F361	X			
F362	X			
F363	✓			
F364	X			

(a) Standard: Patient transfer.

A hospital and a skilled nursing facility shall be considered to have a transfer agreement in effect if, by reason of a written agreement between them or (in case the two institutions are under common control) by reason of a written undertaking by the person or body which controls them, there is reasonable assurance that:

1) Transfer of patients will be effected between the hospital and the skilled nursing facility, ensuring timely admission, whenever such transfer is medically appropriate as determined by the attending physician, and

2) There will be interchange of medical and other information necessary or useful in the care and treatment of individuals transferred between the institutions, or in determining whether such individuals can be adequately cared for otherwise than in either of such institutions, and

3) Security and accountability for patients' personal effects are provided on transfer.

393

Transfer Agreement

EXPLANATORY STATEMENTS

FORM SSA-1569 (10-74)

49

Defendants' Exhibit No. 6

NAME OF FACILITY: Glen Court Nursing Center 39-5337 0460357

	YES	NO	N/A	
F365				☐ MET X NOT MET

XV. Physical environment (405.1134) — The skilled nursing facility is constructed, equipped, and maintained to protect the health and safety of patients, personnel, and the public.

(a) Standard: Life safety from fire.

The skilled nursing facility meets such provisions of the Life Safety Code of the National Fire Protection Association (21st Edition, 1967) as are applicable to nursing homes; except that, in consideration of a recommendation by the State survey agency, the Secretary may waive for such periods as deemed appropriate specific provisions of such Code which, if rigidly applied would result in unreasonable hardship upon a skilled nursing facility, but only if such waiver will not adversely affect the health and safety of the patients; and except that the provisions of such Code shall not apply in any State if the Secretary finds, in accordance with applicable provisions of section 1861(j)(13) of the Social Security Act, that in such State there is in effect a fire and safety code, imposed by State law, which adequately protects patients in skilled nursing facilities. Where waiver permits the participation of an existing facility of two or more stories which is not of at least 2-hour fire resistive construction, blind, nonambulatory, or physically handicapped patients are not housed above the street level floor unless the facility is of 1-hour protected noncombustible construction (as defined in National Fire Protection Association Standard No. 220), fully sprinklered 1-hour protected ordinary construction, or fully sprinklered 1-hour protected wood-frame construction. Nonflammable medical gas systems, such as oxygen and nitrous oxide, installed in the facility comply with applicable provisions of National Fire Protection Association Standard No. 56B (Standard for the Use of Inhalation Therapy) 1968 and National Fire Protection Association Standard No. 56F (Nonflammable Medical Gas Systems) 1970.

394

Physical Environment

EXPLANATORY STATEMENTS

F365 Patients were observed unattended, in patient lounges with no provisions for summoning assistance

FORM SSA-1569 (10-74)

51

NAME OF FACILITY: Town Court Nursing Center 39-5337 040357

	YES	NO	N/A
F375	X		
F376		X	
F377		X	
F378	X		
F379		X	
F380		X	
F381	Y		
F382	X		
F383	X		
F384	X		
F385	X		
F386		X	
F387	X		

4.2 Is the width and grade of walks used by patients and public, designed so that they can be utilized by the handicapped?

4.3 If the facility has a parking lot, is properly designated parking space available near the building, allowing room for the physically handicapped to get in and out of an automobile onto a surface suitable for wheeling and walking?

5.1 Are ramps designed so that they can be negotiated by individuals in wheelchairs?

5.2 Is there a primary entrance usable by persons in wheelchairs? (LSC-SRF 3-5)

5.3 Are doors used by patients and public of sufficient width and so equipped and of a weight to permit persons in wheelchairs to open them with a single effort? (LSC-SRF 4-2)

5.4.1 Are stairs that may be used by the physically handicapped of a height and design that allows such individuals to negotiate them without assistance?

5.4.3 Are these stairs equipped with handrails, at least one of which extends past the top and bottom steps?

5.5 Are floors non-slip and on a common level or connected by a negotiable ramp on each story?

5.6 Is there an appropriate number of toilet rooms accessible to and usable by the handicapped?

5.7 Is there an appropriate number of water fountains accessible to and usable by the handicapped?

5.8 Is there an appropriate number of public telephones accessible to and usable by the handicapped?

5.9 If a multi-story building, are elevators accessible to and usable by the handicapped, at entrance level and all levels normally used by the public? (LSC-SRF 7-4)

5.10 Are switches and controls of frequent or essential use within reach of wheelchair users?

Physical Environment (Continued)

EXPLANATORY STATEMENTS

395

FORM SSA-1569 (10-74)

53

NAME OF FACILITY: Town Court Nursing Center 39-5337 040357

	YES	NO	N/A
F388		X	
F389	X		
F390	X		
F391	→	X	
F392	→	X	
F393	→	X MET	☐ NOT MET
F394	X		
F395	X		
F396	→	☐ MET	X NOT MET
F397	X		
F398	X		

5.11 Does the facility provide appropriate means for the blind to identify rooms, facilities, and hazardous areas?

5.12 Does the facility provide simultaneous audible and visual warning signals? (LSC-SRF 6-1)

5.13 Does the facility exercise safeguards to eliminate hazards for the handicapped?

Are patient closets accessible to and usable by the physically handicapped? 1. X YES 2. ☐ NO

Are patient beds of a height that permits an individual in a wheel chair to get in and out of bed unassisted? 1. X YES 2. ☐ NO

(d) Standard: Nursing unit.

Each nursing unit has at least the following basic service areas: Nurses station, storage and preparation area(s) for drugs and biologicals, and utility and storage rooms that are adequate in size, conveniently located, and well lighted to facilitate staff functioning.

The nurses station is equipped to register patients' calls through a communication system from patient areas, including patient rooms and toilet and bathing facilities.

(e) Standard: Patient rooms and toilet facilities.

Patient rooms are designed and equipped for adequate nursing care and the comfort and privacy of patients.

They have no more than four beds, except in facilities primarily for the care of the mentally ill and/or retarded where there shall be no more than 12 beds per room. (An institution primarily engaged in the care of the mentally retarded or in the treatment of mental diseases cannot qualify as a participating skilled nursing facility under Medicare.)

Physical Environment (Continued)

EXPLANATORY STATEMENTS

F388 The facility does not provide a means for the blind to identify hazardous areas

F389 The facility does not provide simultaneous audible and visual warning signals.

F396, 397 Four (5) patients were observed in bed with the patient Call bell out of reach

Patient observed sitting in chairs did not have call bells within reach

Primary nursing in general patient rooms on the 2nd and 3rd floor were too short to insure primary in treatment and/or care of the patients

Cx 36, F75

396

FORM SSA-1569 (10-74)

54

Defendants' Exhibit No. 6

NAME OF FACILITY: Pine Crest Nursing Center 39-5337 0460357

	YES	NO	N/A
F399			
F400	X		
F401	X		
F402	X		
F403	X		
F404	X		
F405	X		
F406	X		
F407	X		
F408	X		
F409	X		
F410	X		
F411	SEATING CAPACITY OF DINING AREA(S) 45		
F412	NUMBER OF PATIENTS NORMALLY EATING IN DINING ROOM 20		

Single patients rooms measure at least 100 square feet.

Multipatient rooms provide a minimum of 80 square feet per bed.

The Secretary (or in the case of a facility participating as a skilled nursing facility under title XIX only, the survey agency — see 249.33(a)(1)(i) of this title) may permit variations in individual cases where the facility demonstrates in writing that such variations are in accordance with the particular needs of the patients and will not adversely affect their health and safety.

Each room is equipped with, or is conveniently located near, adequate toilet and bathing facilities.

Each room has direct access to a corridor and outside exposure, with the floor at or above grade level.

F403 → X MET ☐ NOT MET

(f) Standard: Facilities for special care.

Provision is made for isolating patients as necessary in single rooms ventilated to the outside, with private toilet and handwashing facilities.

Procedures in aseptic and isolation techniques are established in writing and followed by all personnel.

Such areas are identified by appropriate precautionary signs.

F407 → X MET ☐ NOT MET

(g) Standard: Dining and patient activities rooms.

The facility provides one or more clean, orderly, and appropriately furnished rooms of adequate size designated for patient dining and for patient activities.

These areas are well-lighted and well-ventilated.

If a multipurpose room is used for dining and patient activities, there is sufficient space to accommodate all activities and prevent their interference with each other.

Physical Environment (Continued)

EXPLANATORY STATEMENTS

Isolation Room - 359, 459, 559

Defendants' Exhibit No. 6

NAME OF FACILITY: Pine Crest Nursing Center 39-5337 0460357

	YES	NO	N/A
F413	X		
F414	X		
F415	X		
F416		X	
F417	X		
F418	X		
F419	X		
F420		X	
F421	X		
F422	X		
F423	X		
F424	X		
F425	X		
F426	X		
F427	X		

F413 → X MET ☐ NOT MET

(h) Standard: Kitchen and dietetic service areas.

The facility has kitchen and dietetic service areas adequate to meet food service needs.

These areas are properly ventilated, and arranged and equipped for sanitary refrigeration, storage, preparation, and serving of food as well as for dish and utensil cleaning and refuse storage and removal.

F416 → ☐ MET X NOT MET

(i) Standard: Maintenance of equipment, building, and grounds.

The facility establishes a written preventive maintenance program to ensure that equipment is operative

The interior and exterior of the building are clean and orderly.

All essential mechanical, electrical, and patient care equipment is maintained in safe operating condition.

F420 → ☐ MET X NOT MET

(j) Standard: Other environmental considerations.

The facility provides a functional, sanitary, and comfortable environment for patients, personnel, and the public.

Provision is made for adequate and comfortable lighting levels in all areas.

There is limitation of sounds at comfort levels.

A comfortable room temperature is maintained

There are procedures to ensure water to all essential areas in the event of lost of normal water supply.

Adequate ventilation through windows or mechanical means or a combination of both.

Corridors are equipped with firmly secured handrails on each side.

Physical Environment (Continued)

EXPLANATORY STATEMENTS

1) N16, 418, N19
The following were in need of repair:
a) plasterboard approx. 4sq. inches missing from the bed in Rm 511
b) cement wall cracking away from the beam in the food storage area
c) the paper was coming off the wall outside Rm 511
d) safe bars were not provided for the toilet in Rm 511 bathroom
e) Rm 412 - no assist bars near toilet the metal door on the closet was bent and had sharp edges protruding
f) Rm 452 - the dresser drawer was missing a pull on the bottom 3/28/81
(cont'd on pg 56A)

F420, 421 There were no thermometers available in the nursing units to check proper temperature of hot water
There was a strong odor of urine in the south wing of the second floor and room 206 on the second floor
The following unacceptable conditions were observed:
a) the floor in Rm 508 was sticky and encrusted with food particles
b) Rm 511 - bedpan was stored under the bedside cabinet and a heavy odor was observed on the floor of the B.R.
c) Rm 309 - curtains stained
d) Rm 417 and 421 had offensive odor
e) Rm 552 - paper towels were not available in the B.R., water pitcher, flowers and vase were soiled

See 56A

Town Court Nursing Center 39-5337 0400357

F416, 418, 419 (Cont'd)

Rm 309 - the dresser drawer had no handles
Rm 313 - radiator cover was broken
Rm 314 - side rail on patients bed was broken, the radiator cap was missing, the radiator cover (in the closet) was coming off, plaster was flaking above the radiator in the closet
Rm 415 - the sink in the bathroom was coming away from the wall
Trash was observed stored in the fire exit staircells (original building) on the fourth and fifth floors
5th floor dining room - burn marks were observed on the floor
Call bells not working in Rm 550, 353
Rm 509 - wall paper is pulling away from the wall
Rm 517 - corner baseboard radiator cover was coming off the marked light was not working
Rm 512 (Tub room) the tiles were broken
Rm 551 - Commode bed was broken
4/21
Rm 509 - bathroom sink was dirty
Rm 517 - bathroom floor was soiled
Rm 402 - bathroom had no paper towels
Rms 450, 451, 452 - bathroom floors were soiled
Rm 412 - Bedpan observed on bed side stand
4th floor employee bathroom - the sink and floor were soiled, stained and cobwebs observed in bath area

a) water fountain (3rd floor) was not working
b) Rm 318 Bedroom tiles were broken
c) 554 (Tub room) - knob was off call bell leaving a sharp edge exposed
d) Rm 517 - the cord to the marked light cannot be reached by the patient

Cross reference F41, 45

399

56A

Infection Control

Physical Environment (Continued)

EXPLANATORY STATEMENTS

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

Infection Control

EXPLANATORY STATEMENTS

	YES	NO	N/A	
F429				MET ☒ NOT MET ☐

XVI. Infection control (405.1135) — The skilled nursing facility establishes an infection control committee of representative professional staff with responsibility for overall infection control in the facility. All necessary housekeeping and maintenance services are provided to maintain a sanitary and comfortable environment and to help prevent the development and transmission of infection.

F429				MET ☐ NOT MET ☒

(a) Standard: Infection control committee.

The infection control committee is composed of members of the medical and nursing staffs, administration, and the dietetic, pharmacy, housekeeping, maintenance, and other services.

F430				
F431	X			
F432		X		
		X		

The committee establishes policies and procedures for investigating, controlling, and preventing infections in the facility.

Monitors staff performance to ensure that the policies and procedures are executed.

(a) Members of infection control committee.

NAME	POSITION
Dr. B Chase D.O.	Supervising - Medical Director
Dr. Sangani, M.D.	Staff Physician
Dr. Waltman, M.D.	

F433				FREQUENCY OF MEETINGS: (1) ☐ WEEKLY (2) ☐ MONTHLY (3) ☒ QUARTERLY
F434				DATE OF LAST MEETING: 12/15/76
F435				MET ☐ NOT MET ☒

(b) Standard: Aseptic and isolation techniques.

F436		X		
F437	X			

Written effective procedures in aseptic and isolation techniques are followed by all personnel.

Procedures are reviewed and revised annually for effectiveness and improvement.

Dr. H Faludi, M.D.
Dr. M Cohen, M.D.
Mr Wm. Fagan, Food Service Supervisor
Mrs. Lou Siegel, M.S.N.
Mr. Donald Lewis, Administrator
Miss B Carew, R.N. D.O.N.
Mrs Y. Carew, R.N. Staff Nurse
Mrs. BG. Skemplett, V.P.
Mrs C Cassidy, R.N.
Mr. T. Zedrow, Maintenance - Housekeeping
Mrs. M. White, Laundress
Mr. Weiss, Pharmacist

F429, 431, 432 = F435, 436 - A disposable douche set was observed stored in the bedside cabinet in Rm 401 "cw pg 57A"

XRF97, 99

400

FORM SSA-1569 (10-74)

57

NAME OF FACILITY: Town Court Nursing Center 39-5331 0400357

Infection Control

A tip to the Foley catheter drainage bag was observed stored, uncovered, in the B.R. on the floor behind the bed.

401

157A

NAME OF FACILITY: Town Court Nursing Center 39-5337 0400357

	YES	NO	N/A	
F438				X MET ☐ NOT MET
F439	X			(c) *Standard: Housekeeping.* The facility employs sufficient housekeeping personnel
F440	X			Provides all necessary equipment to maintain a safe, clean, and orderly interior.
F441	X			A full-time employee is designated responsible for the services and for supervision and training of personnel.
F442	X			Nursing personnel are not assigned housekeeping duties.
F443			✓	If a facility has a contract with an outside resource for housekeeping services the facility and/or outside resource meets the requirements of the standard.
				NAME OF HOUSEKEEPING SUPERVISOR: Mr. T. Zadroga
F444				☐ MET X NOT MET
F445	X			(d) *Standard: Linen.* The facility has available at all times a quantity of linen essential for proper care and comfort of patients.
F446		X		Linens are handled, stored, processed, and transported in such a manner as to prevent the spread of infection.
F447				X MET ☐ NOT MET
				(e) *Standard: Pest control.* The facility is maintained free from insects and rodents through operation of a pest control program. Humphrey's 2x2/month

FORM SSA-1569 (10-74) 58

402

Infection Control (Continued)

EXPLANATORY STATEMENTS

F429, 431, 432 Procedures for the handling of soiled and clean linen are not being followed as indicated by F444, 446

a) The laundress was observed carrying clean linen in a mesh bag, over her shoulder

b) Blue (3) soiled bags of laundry were observed on the floor of the laundry room

c) Clean linen in a mesh bag, was observed on the floor in Room 511

d) Clean linen was observed on a chair

e) Clean and soiled linen were stored together in the Soiled Utility room

f) The laundress also performs housekeeping duties.

g) The soiled linen bags were stored

Laurel Court Nursing Center 39-5337 0400357

X MET ☐ NOT MET

	YES	NO	N/A
F448			
F449			
F450		X	
F451		X	
F452		X	
F453		X	
F454		X	
F455		X	
F456			
F457			
F458		X	
F459			

XVII. Disaster preparedness (405.1136) — The skilled nursing facility has a written plan, periodically rehearsed, with procedures to be followed in the event of an internal or external disaster and for the care of casualties (patients and personnel) arising from such disasters.

X MET ☐ NOT MET

(a) Standard: Disaster plan.

The facility has an acceptable written plan in operation, with procedures to be followed in the event of fire, explosion, or other disaster.

The plan is developed and maintained with the assistance of qualified fire, safety, and other appropriate experts.

Includes procedures for prompt transfer of casualties and records.

Instructions regarding the location and use of alarm systems and signals and of fire-fighting equipment.

Information regarding methods of containing fire

Procedures for notification or appropriate persons.

Specifications of evacuation routes and procedures. (See 405.1134(a).)

☐ MET X NOT MET

(b) Standard: Staff training and drills.

All employees are trained, as part of their employment orientation, in all aspects of preparedness for any disaster.

The disaster program includes orientation and ongoing training and drills for all personnel in all procedures so that each employee promptly and correctly carries out a specific role in case of a disaster. (See 405.1121(h).)

403

Disaster Preparedness

EXPLANATORY STATEMENTS

F457, 459 A fire drill conducted by the survey team revealed the following:

a) 5th floor - only 1 aide was on the floor unit patients were left unattended in the day room with the door closed - no one assumed a charge position no one was responsible for taking the proper records

b) 4th floor - the personnel continued to clean - No attempt to secure records Rm 404 - door was blocked open Stretcher unattended in lounge, Rm 409 and 413 The doors to Rm 459, 453, 455, 451, 450 were left open

c) 3rd and 2nd floors - no attempt to secure records

Supervised fire drill - 3-24-76

Fire Safety Training Program - 1/12/77

	1st	2nd
7-3	1/12/77	1/10/77
3-11	2/12/77	11/29/76
11-7	12/15/76	9/30/76

FORM SSA-1569 (10-74)

59

Laurel Court Nursing Center 39-5337 0400357

X MET ☐ NOT MET

	YES	NO	N/A
F460			
F461			
F462		X	
F463		X	

XVIII. Utilization review (405.1137) — The skilled nursing facility carries out utilization review of the services provided in the facility at least to inpatients who are entitled to benefits under the program(s). Utilization review has as its overall objectives both the maintenance of high quality patient care and assurance of appropriate and efficient utilization of facility services. There are two elements to utilization review: medical care evaluation studies that identify and examine patterns of care provided in the facility and review of extended duration cases which is concerned with efficiency, appropriateness, and cost effectiveness of care. If the Secretary determines that the utilization review procedures established pursuant to title XIX are superior in their effectiveness to the procedures required under this section, the Secretary may, to the extent that the Secretary deems it appropriate, require for purposes of this title that the procedures established pursuant to title XIX be utilized instead of the procedures required by this section.

X MET ☐ NOT MET

(a) Standard: Written plan of utilization review activity.

The facility has a written, currently applicable utilization review plan, approved by the governing body and the medical director or organized medical staff (if applicable),

which includes at least the following: (1) procedures for medical care evaluation studies, and for dissemination and follow-up of study findings and committee recommendations; (2) definition of the period(s) of extended duration and procedures for review of individual cases of extended duration; (3) a method for identifying patients other than by name (e.g., medical record number); and (4) provisions for maintaining written records of committee activities.

404

Utilization Review

EXPLANATORY STATEMENTS

Fiscal Intermediary -
Blue Cross of Greater Philadelphia
1333 Chestnut Street
Philadelphia Pa.

U & L plan approved by single state agency -

FORM SSA-1569 (10-74)

60

Four Count Nursing Center 31-5337 c46357

Utilization Review (Continued)

EXPLANATORY STATEMENTS

F465 Two physicians who are F467 not professionally involved in the case being reviewed are not always present at U R committee meeting.

405

X MET ☐ NOT MET

(a) Standard: Composition and organization of utilization review committee.

The committee or group responsible for utilization review is composed of two or more physicians and optionally, other professional personnel.

All medical determinations are made by the physician members of the committee.

No physicians review any case in which they were professionally involved.

COMMITTEE IS (1) ☐ IN-HOUSE (2) ☐ LOCAL MEDICAL SOCIETY (3) X OTHER (SPECIFY): Staff physicians

INDICATE THE PROFESSIONAL DISCIPLINES REPRESENTED ON THE UTILIZATION REVIEW COMMITTEE AND GIVE NUMBER OF EACH:

PHYSICIANS	2
NURSES	1
ADMINISTRATORS	1
MEDICAL RECORD ADMINISTRATOR	0
SOCIAL WORKER	1 (not M.S.W)
OTHER (SPECIFY)	2

X MET ☐ NOT MET

(c) Standard: Medical care evaluation studies.

Medical care evaluation studies are performed to promote the most effective and appropriate use of available health facilities and services consistent with patient needs and professionally recognized standards of health care.

Studies which could include assessment of findings resulting from periodic medical review, emphasize identification and analysis of patterns of patient care and changes indicated to maintain consistent high quality of services.

FORM SSA-1569 (10-71)

61

Four Count Nursing Center 31-5337 c46357

Utilization Review (Continued)

EXPLANATORY STATEMENTS

406

Each medical care evaluation study (whether medical or administrative in emphasis) identifies and analyzes factors related to the patient care rendered in the facility, and serves as the basis for recommendations for change beneficial to patients, staff, the facility, and the community.

Studies, on a sample or other basis, include but need not be limited to, admissions, durations of stay, and professional services (including drugs and biologicals) furnished.

At least one study is in progress at any given time.

ARE STUDIES MADE? (1) X YES (2) ☐ NO

IS A STUDY NOW IN PROGRESS? (1) X YES (2) ☐ NO

IF YES, TYPE OF STUDY: evaluation of the care and treatment of decubits

IF NO, GIVE EXAMPLE OF LAST STUDY DONE

X MET ☐ NOT MET

(d) Standard: Review of cases of extended duration.

Periodic review is made of each current inpatient skilled nursing facility beneficiary case of continuous extended duration, the length of which is defined in the utilization review plan, to determine whether further inpatient stay is necessary.

Reviews may also be applied to patients not covered by the program, and/or to cases where duration of stay has not yet reached the definition(s) of extended duration.

FORM SSA-1569 (10-71)

62

Defendants' Exhibit No. 6

NAME OF FACILITY: Glen Court Nursing Center 39-5237 040357

	YES	NO	N/A	
F486		X		The plan may specify a different number of days for different diagnostic classes of cases, or may use the same number of days for all cases. In any event, the period(s) specified bears a reasonable relationship to current average length-of-stay statistics, and does not exceed 30 days from admission.
F487			X	An exception to this 30-day limit may be made where the specific diagnostic classes of cases have average lengths of stay exceeding 30 days, in which instances the plan specifies the extended duration period for each specific diagnostic class.
F488	X			In cases for which advance approval of payment has been made, the period(s) of extended duration may be defined as that period for which payment has been approved.
F489		X		After the initial review, reviews for medical necessity for further inpatient stay are made at least every 30 days for the first 90 days and at least every 90 days thereafter.
F490		X		A review is made and a final determination regarding the patients' further care is reached no later than 7 days following the time period specified as the period of extended duration in the utilization review plan.

407

The utilization review plan specifies the number of continuous days of inpatient stay following which a review is made to determine whether further inpatient services are medically necessary. The plan may specify a different number of days for different classes of cases.

F491 DEFINITION OF EXTENDED DURATION:
1. ___ VARIES BY DIAGNOSIS OR CHARACTERISTIC
2. X A SINGLE NUMBER OF DAYS FOR ALL DIAGNOSES.

F492 INDICATE NUMBER OF DAYS 38

F493 WHAT MECHANISMS ASSURE TIMELY REVIEW OF EXTENDED DURATION CASES? (WITHIN 7 DAYS OF STIPULATED DATES)
1. ___ DELEGATE PHYSICIAN (3) X OTHER (SPECIFY) all cases reviewed
2. ___ CASES MAILED

F494 GIVE NUMBER OF EXTENDED DURATION CASES REVIEWED IN PRIOR CALENDAR MONTH MC-7 MIA-38

Utilization Review (Continued)

EXPLANATORY STATEMENTS

FORM SSA-1569 10-74

63

Defendants' Exhibit No. 6

NAME OF FACILITY: Glen Court Nursing Center 39-5337 040357

	YES	NO	N/A	
F495				X MET ☐ NOT MET *(e) Standard: Admission or further stay not medically necessary.*
F496	X			Final determination regarding the necessity for admission or for further stay, including stay beyond the period of extended duration, is limited to physician members of the committee and may be made by the full physician complement, a subcommittee, or a single committee physician.
F497	X			When a single committee physician has decided that admission is not medically necessary or is inappropriate, or that further stay is no longer medically necessary, further concurrence is obtained as specified in the plan (to include at least a second committee physician) within the 7-day period.
F498	X			If committee members determine, from an extended duration review or a medical care evaluation study, that further stay is not medically necessary, the attending physician is consulted or given the opportunity for consultation, and
F499	X			notification is made in writing within 48 hours by the committee to the administration, the attending physician, and the patient or the patient's representative.
F500				X MET ☐ NOT MET *(f) Standard: Administrative responsibilities.*
F501	X			The administrative staff of the facility is kept directly and fully informed of committee activities to facilitate support and assistance.
F502	X			The administrator studies and acts upon recommendations made by the committee, coordinating such functions with appropriate staff members.

408

Utilization Review (Continued)

EXPLANATORY STATEMENTS

FORM SSA-1569 (10-74)

64

NAME OF FACILITY: Court Nursing Center 34-5337 04EC357

Utilization Review (Continued)

	YES	NO	N/A	BRIEFLY DESCRIBE METHODS OF ADMINISTRATIVE SUPPORT:	EXPLANATORY STATEMENTS
				Administrator serves on the U.R. Committee Secretarial assistance	
				List below the recommendations made by the URC as a result of medical care evaluation studies, analysis of facility practices, etc., since the last survey. Indicate for each one listed the action taken by the facility: The last study made on falls Recommendation - The staff will send record pt. medication & the incident/accident form when a pt falls.	
F503				Does facility's administration make available to the committee information on discharge planning or on other resources for patient care? (1) [X] YES (2) [ ] NO DESCRIBE: through social services and discharge planning procedure	
				Briefly describe mechanism used by administrator to assure transfer of information required for continuity of patient care: 3 part transfer form	
F504				IS TRANSFER OF INFORMATION TIMELY? (1) [ ] YES (2) [X] NO	F504, 505 cross reference with F346
F505				IS CONTENT OF INFORMATION ADEQUATE FOR CONTINUING CARE? (1) [ ] YES (2) [X] NO	

409

FORM SSA-1569 (10-74) 65

NAME OF FACILITY: Court Nursing Center 34-5337 04EC357

Utilization Review (Continued)

	YES	NO	N/A		EXPLANATORY STATEMENTS
F506				[X] MET [ ] NOT MET *(g) Standard: Utilization review records.*	
F507	X			Written records of committee activities are maintained.	
F508	X			Appropriate reports, signed by the committee chairman, are made regularly to the medical staff, administrative staff, governing body, and sponsors (if any).	
F509	X			Minutes of each committee meeting are maintained and include at least: (1) Name of committee, (2) Date and duration of meeting, (3) Names of committee members present and absent, (4) Description of activities presently in progress to satisfy the requirements for medical care evaluation studies, including the subject and reason for study, dates of commencement and expected completion, summary of studies completed since the last meeting, conclusions, and followup on implementation of recommendations made from previous studies, and (5) Summary of extended duration cases reviewed, including the number of cases, case identification number, admission and review dates, and decisions reached, including the basis for each determination and action taken for each case not approved for extended care.	

410

FORM SSA-1569 (10-74) 66

Nursing Center 3-5337 Doc 357

Utilization Review (Continued)

EXPLANATORY STATEMENTS

THE COMMITTEE RECORDS INCLUDE:

F310 → X LIST OF PATIENT CASES REVIEWED

F311 → X DECISIONS ON PATIENT CASES REVIEWED

F312 → X ADMINISTRATIVE ACTIONS RECOMMENDED BY THE COMMITTEE

HOW OFTEN ARE MEETINGS OF THE FULL UR COMMITTEE HELD, AS VERIFIED BY THE SURVEYOR?

F313 → (1) ☐ WEEKLY (2) X MONTHLY (3) ☐ QUARTERLY

INTERNAL RECORDS OR METHODS WHICH ARE USED BY THE UR COMMITTEE FOR REVIEW OF EXTENDED DURATION CASES AND MEDICAL CARE EVALUATION STUDIES INCLUDE:
(CHECK ALL APPROPRIATE BOXES FOR EACH TYPE OF CASE)

METHOD OR RECORD	CASES: EXTENDED DURATION (1)	MCE STUDY (2)	BOTH (3)
F314 → COMPLETE MEDICAL RECORD	X		
F315 → ABSTRACT OF MEDICAL RECORD			
F316 → FACE SHEET OF MEDICAL RECORD			
F317 → UTILIZATION REVIEW CHECK-LIST			
F318 → INTERVIEW WITH ATTENDING PHYSICIAN			
(3) → OBSERVATION OF PATIENT		X	
F319 → OTHER (SPECIFY)			

411

FORM SSA-1569 (5-74)

67

Nursing Center 3-5337 Doc 357

Utilization Review (Continued)

EXPLANATORY STATEMENTS

F 521, 522 Cross reference
F 335, 344, 345, 346

MET X NOT MET

F515 →

(iv) Standard. Discharge planning.

The facility maintains a centralized, coordinated program to ensure that each patient has a planned program of continuing care which meets his postdischarge needs.

1) The facility has in operation an organized discharge planning program.

The utilization review committee, in its evaluation of the current status of each extended duration case, has available to it the results of such discharge planning and information on alternative available community resources to which the patient may be referred.

F524 → X

2) The administrator delegates responsibility for discharge planning, in writing, to one or more members of the facility's staff, with consultation, if necessary, or arranges for this service to be provided by a health, social, or welfare agency.

F525 → X

3) The facility maintains written discharge planning procedures which describe (i) how the discharge coordinator will function, and his authority and relationships with the facility's staff; (ii) the time period in which each patient's need for discharge planning is determined (preferably within 7 days after the day of admission); (iii) the maximum time period after which a reevaluation of each patient's discharge plan is made; (iv) local resources available to the facility, the patient, and the attending physician to assist in developing and implementing individual discharge plans; and (v) provisions for periodic review and reevaluation of the facility's discharge planning program.

F526 → X

4) At the time of discharge, the facility provides those responsible for the patient's postdischarge care with an appropriate summary of information about the discharged patient to ensure the optimal continuity of care. The discharge summary includes at least current information relative to diagnoses, rehabilitation potential, a summary of the course of prior treatment, physician orders for the immediate care of the patient, and pertinent social information.

412

FORM SSA-1569 (5-74)

68

XX.

TRANSCRIPT OF HEARING OF SEPT. 15, 1977

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(106) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.

v.

FRANK S. BEAL, etc., et al.,

Defendants

Philadelphia, Pennsylvania
September 15, 1977

Before HON. JOHN P. FULLAM, J.

Appearances

For Rothschild, O'Brien and Frankel by Nathan L. Posner, Esq., Jeffrey B. Albert, Esq. for Plaintiff Town Court Nursing Center, Inc.

(107) Abrahams & Loewenstein by William F. Coyle, Esq., for Additional Plaintiffs

Margaret Hathaway, Esq., Assistant Attorney General for Secretary of the United States, Department of Health, Education and Welfare, Defendant

Robert S. Forster, Jr., Esq., Assistant United States Attorney, for the Government

Maria Parisi Vickers, Esq., Assistant Attorney General for the Commonwealth of Pennsylvania

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(Commenced at 10:15 o'clock a.m.)

THE COURT: Town Court Nursing Center and others v. Joseph Califano and others.

(Pause.)

THE COURT: If anyone has anything to say, let him now speak or hereafter let him hold his peace.

MR. POSNER: Your Honor, I arise because possibly—I don't know whether it is smart to keep quiet.

We are here before Your Honor because an Order that Your Honor placed at the last hearing in which you gave us temporary injunctive relief pending what I call the redetermination of the situation by the federal authorities. "Reconsideration" is the word that is used.

(108) I now find that within three or four days thereafter without any further inspection, without any other information despite the assurances that I had in this courtroom, all of—not of record—they affirmed their decision.

I come back to this Court and say under the law there was an administrative hearing that we are still entitled to.

THE COURT: I think the question in my mind is: What is the next step in the administrative process?

MR. POSNER: The next step in the administrative process is for the eventual appointment for an administrative law judge, if you will, to hear this case on its merits. And until that time I would like to have the protection of this Court.

THE COURT: What is the probable timing thereof?

MR. POSNER: I can't answer that. I imagine the Government would have to answer that much better than I can.

THE COURT: You can answer by saying you don't know. I take it you don't know.

MR. POSNER: That is correct. Then that is my answer to Your Honor.

But I am looking for—

THE COURT: Let's find out.

MR. POSNER: Sure.

MS. HATHAWAY: Your Honor, I believe it would take anywhere from four to six months for the scheduling and holding of an administrative hearing in the case.

(109) THE COURT: And what is the position of the Government as to what should [be] happening in the interim?

MS. HATHAWAY: Well, Your Honor, our position remains the same. We are very concerned about the welfare of the patients at Town Court, and we are

not at all assured that the conditions there are such the patients should merely be allowed to remain there during the pendency of the administrative hearing.

THE COURT: I will note for the record on the basis of the record presented at the previous hearing I am entirely satisfied that the patients are being adequately cared for.

I suspect that the real basis for the administrative action may have to do with matters which are not before this Court or any other court that I know of as yet. That has to do with the rumors about the possible financial difficulty; that is to say, allegations of improper certification and fraudulent action in connection with the Medicare program.

Obviously what I am about to say has nothing whatever to do with any action which may appropriately be taken if such charges are justified.

But certainly on the basis of this record the alleged violations are extremely technical, and even the ones which were not technical, assuming they had merit, were relatively minor and in my judgment not a cause for any alarm at all.

The problem, as I see it, is the regulations are being administered in a very inflexible fashion. The Government relies (110) upon the certification of compliance or non-compliance by the state inspectors. The state inspectors who made the inspection apparently did so without any awareness of what the consequences of their finding would be.

Therefore, in finding what would at most be a technical violation, if it was a violation in the absence

of written regulations, on things which were being done improperly they enabled the Government to trigger this business about if you had been in violation before and found in violation again an automatic termination. It seems to me that the welfare of the patients under these circumstances in the absence of available, suitable alternatives is such that we simply can't turn them loose.

I will also note that the Government's decision was rendered without any hearing and that the so-called reconsideration does not appear to have amounted to much in the reconsideration. In the event a hearing was held, no additional information was sought and no additional inspections were made.

For those reasons, I will enter an Order continuing the preliminary injunction pending the outcome of the administrative proceedings.

I would point out that the timing of the duration of the injunction is almost entirely within the control of the respondents. I find it difficult to understand why that should take six months, but if it does, it is their fault and not anybody (111) else's.

All right, that is all.

I will enter an Order continuing the preliminary injunction pending completion of the administrative review process by the HEW.

MR. FORSTER: Your Honor, may the Government address the Court?

THE COURT: Yes, of course.

MR. FORSTER: Your Honor, I am here instead of Mr. DeLuca, who is Government counsel of record,

and I have with me Ms. Hathaway who appeared before Your Honor in chambers in a conference before and in the hearing that was held previously.

I was not here at that hearing and, therefore, Your Honor, I don't know of my own knowledge the record as it existed at the conclusion of that hearing.

We believe, however, that the Town Court situation may be different than Your Honor understands it to be at this point. And to that end we have with us here this morning a public health officer from the United States Public Health Service who is personally familiar with the conditions under which—

THE COURT: You have evidence you want to present?

MR. FORSTER: Perhaps so, Your Honor.

THE COURT: You are the litigator, I am not. If you want to present evidence, I will be glad to hear it.

MR. FORSTER: We would like to present the testimony (112) of that person.

In addition, we have the Assistant District Attorney from the County and City of Philadelphia who will testify if the Court cares or perhaps—

THE COURT: Bear in mind I am not the one who decides how you litigate; you are the one. Do what you want to do.

MR. FORSTER: The difficulty—all right, sir, we will.

Thank you.

THE COURT: Proceed.

To the extent I said I will enter an Order, I obviously will withdraw those comments and have made no disposition of this motion.

You may proceed now to present evidence.

MS. HATHAWAY: Your Honor, I call Claudette Campbell.

CLAUDETTE V. CAMPBELL, sworn.

THE COURT: B or V?

THE WITNESS: V as in Victor.

THE COURT: Thank you.

Direct Examination

BY MS. HATHAWAY:

Q. Ms. Campbell, will you state for the record your title, please.

A. My title is Regional Officer's Consultant for the Office— (113) it is for Long-Term Care, Health, Education and Welfare.

Q. Could you summarize very quickly for the Court your qualifications.

A. My qualifications are as follows: I am a registered nurse, a professional registered nurse for a period to date of 15 years; I have a Bachelor of Science degree in nursing and a Master of Public Health degree.

Q. Would you describe your role in the Bureau of Health Standards and Quality Review of the Town Court Nursing home.

A. Yes. My role with respect to review of the Town Court Nursing Home in any adverse actions that

are submitted to our regional office they require the input of a health professional. The file is completed for review by staff, and I am responsible for the file review to make a recommendation for concurrence or non-concurrence of the adverse action that has been recommended.

The review consists of a consideration of all documentation submitted; and paramount to that review, I must ensure that standards have been applied and that the recommendations have been substantiated.

Moreover, the review must look at the outcome with respect to the findings; that is, how it relates to the health and safety of patients.

Another important program in part of this review and very critical is the history or the responsible nature of a provider to maintain the standards as it relates to health and safety (114) of patients.

Q. How did you become familiar with Town Court?

A. My initial familiarity with Town Court Nursing Center began in 1974 with the recommendation of termination action, and I was involved with the final reviews of that situation.

More recently as a result of a complaint that was issued from the District Attorney's office of this County of Philadelphia, the economic crime unit submitted to our regional office a request to investigate a complaint of poor patient care in July of 1976.

THE COURT: Hold it a minute. The economic crime rate?

THE WITNESS: No, crime unit.

THE COURT: Crime unit.

THE WITNESS: Pardon me if I wasn't clear.

THE COURT: All right.

BY MS. HATHAWAY:

Q. Have you ever been to the facility?

A. Yes, I have.

Q. When?

A. Initially in 1976, July 19 through the 23rd, based on a request to investigate a complaint of poor patient care.

Q. You have submitted to the Court an affidavit which summarizes the history. Could you describe the nature—

THE COURT: Excuse me, but when did she do that?

(115) MS. HATHAWAY: I am sorry, Your Honor, it was attached to the brief in opposition to plaintiffs' Motion.

THE COURT: Well, that doesn't make it part of the record. Obviously you can't ask it that way. You can ask if everything in there is true and correct and then offer it as her testimony.

BY MS. HATHAWAY:

Q. Ms. Campbell, I show you a document entitled "Affidavit of Claudette V. Campbell," which is signed and dated September 14, 1977.

Did you prepare that affidavit?

A. Yes, I did.

Q. Can you attest to the accuracy of the statements therein?

A. I can attest to the accuracy of the statements.

THE COURT: And do you?

THE WITNESS: Yes, I do, sir.

THE COURT: O.K.

MS. HATHAWAY: Mark that for me.

(A five-page document entitled "Affidavit of Claudette V. Campbell" dated September 14, 1977, was marked Defendants' Exhibit 7 for identification.)

BY MS. HATHAWAY:

Q. Can you summarize for us the nature of the compliance of Town Court as you saw in your review of the file?

MR. POSNER: I will object to that, sir.

(116) THE COURT: Objection overruled.

THE WITNESS: In summary, I reviewed the file.

With respect to my recommendation for nonrenewal of the current agreement with the Federal Government—

BY MS. HATHAWAY:

Q. Yes?

A. —the summarization as outlined by my review showed a substantiation of the findings that critical conditions of participation were not met. These were medical direction, physician service, nursing services, pharmaceutical services, and medical records.

In looking at the standards that support the condition—a condition is the major health unit of a facility or health system—they ensure through meeting acceptable professional standards that the patient will receive care and services in a safe and adequate manner.

A condition that outlined medical direction was not met having to do with lack of coordination of medical services. It is [to] ensure that physicians are there to supervise their patients.

It is true that we set out specific standards, but these standards are basic professional practices of medical care.

One such standard has to do with when you write orders for your patient they have to be based on a medical evaluation. You look at the patient. You assess the various organs, heart, liver, etc., their bone structure. As you do that, then a (117) recommendation and orders are written and progress notes regarding the status of the patient.

There were omissions in meeting the required time frames. These are of importance to the nursing staff, and the health care providers, so that patients do receive services in an accurate and prompt manner. There cannot be gaps, and we have set time frames and it is based on acceptable medical practices.

Moreover, under physician services there is a requirement that the progress review is on a timely basis, and there is specificity for it. There is a reason. You cannot have the time gaps for that level of patient without having the overview of the physician, and there were omissions in that area.

In some instances physical examinations were not done within the appropriate time frame. The physical examinations tell the physician what is going on so

that he can develop a program that is to be carried out by the staff.

BY THE COURT:

Q. When was all this done?

A. This was a result of the materials submitted as it relates to the current non-renewal of this provider agreement.

Q. I don't understand. I asked you a question. I haven't gotten an answer yet.

A. Do you mean when this was actually observed, the events took place?

(118) Q. When were these omissions and gaps in the time frames observed?

A. Oh, these were observed by the state surveyors during their survey on March 8 through the 11th, 1977.

Q. So you are relying on that report?

A. Yes.

Q. Thank you.

A. May I explain further?

Q. Of course.

A. I think it is important to briefly state that the way we ascertain compliances with our conditions is through an annual survey. Surveys are conducted and findings are recorded and determinations are then made with respect to compliance.

We base decisions on the events and observe answers at that point in time.

BY MS. HATHAWAY:

Q. Were there any other surveys that you reviewed in coming to your decision?

A. The survey that was previous to that was conducted November 22 through the 23rd, 1976, and the

subsequent followup activities in December. And previous to that the federal survey was conducted January 19 through the 23rd of '76.

Q. Were there any changes in the crucial conditions of participation across that time period?

A. There were no significant changes in that the same conditions (119) were found to be on the subsequent three surveys not in compliance.

Q. In your opinion does non-compliance with the condition of participation such as nursing services threaten the safety and welfare of the patients?

A. In my opinion that is the critical service. It is the only 24-hour service that we have skilled nursing around the clock. It has to do with carrying out orders such as treatments, medications, insuring environments to prevent accidents, to maintain an environment of dignity for the patients, and to ensure that in line with the treatments they are carried out in an accurate and competent fashion. It is the critical condition of participation.

Q. And has that condition—has the compliance with that condition improved over the past two years?

MR. POSNER: Objected to, sir.

THE COURT: Objection overruled.

BY MS. HATHAWAY:

Q. As reflected in your file.

A. As reflected in my file the condition has been marked "Not met" from 1974 based on various visits through 1977, March of 1977.

THE COURT: Your affidavit says that in April of 1976 there were found to be no discrepancies and no violations.

THE WITNESS: Based on the review of the file—I am sorry, I thought that the question had to do with my—

(120) THE COURT: Has there been any improvement? Certainly if everything was fine in April of 1976 that represents an improvement, does it not?

THE WITNESS: Yes. I understand. I have misinterpreted that question.

BY MS. HATHAWAY:

Q. Can you explain to the Court the status of the facility between October '74, and the survey in April '76?

A. Could you repeat that question, please?

Q. Could you explain to the Court the status of the facility between October 31, 1974, and April 1976, when they were readmitted to the program?

A. From October 1974, the status of the facility was not a participant based on not meeting the conditions: physician services, nursing services, and etc.

Then there was a time period whereby they sought re-entry. In the April 1976 survey that has been referred to showed from the state survey no standards not met. They were in compliance.

I was explaining my remarks based on November—July 1976, through March 1977. But in April there was a survey with no negative findings.

And then in July we were requested to go in on a complaint; and from July—and again I reiterate this is the period I was referring to—from July 1976, through March 1977, (121) these conditions were indeed found to be not met. And it was a repeat finding of the same conditions not met.

Q. Can you explain the relationship between your office and the state survey agency very briefly?

A. Yes. The state agency serves as an agent to the Federal Government to conduct on an annual basis surveys of providers such as a nursing center participating in the Medicare and Medicaid program. They conduct surveys based on health standards and life safety standards to ascertain compliance. These standards impact significantly on health and safety of patients in the facilities.

There are agents to conduct the surveys on a timely basis, to document the findings, and to make a recommendation to our office with respect to continuance or non-continuance in the federal program.

Q. Did the state survey agency based on the latest surveys—the November '76 and March '77 surveys—recommend to you based on those surveys that the facility be certified for a new provider agreement?

(Pause.)

A. The recommendation for no provider agreement came with the survey of March 8 through the 11th, 1977.

Q. The survey agency did recommend non-certification?

MR. POSNER: Objected to. Counsel is suggesting what the answer should be for the witness.

(122) THE COURT: Whatever the witness says isn't going to change it. It is a matter of record. Either there is or there isn't.

Objection overruled.

THE WITNESS: May I repeat, the non-renewal recommendation from the state agency

came based on the survey of March 8 through the 11th, 1977.

BY MS. HATHAWAY:

Q. Do you consider the violations listed in the March 1977 survey report technical violations?

(Pause.)

MR. POSNER: That is an objectionable question, sir. That is a legal determination.

THE COURT: Objection overruled.

THE WITNESS: I am not clear what is meant by—I heard this used today—technical violations. I am in a health discipline; and, of course, when I review them I am looking at them as it relates to—

THE COURT: Well, specifically the alleged violations that there was an absence of a written procedure for cleaning brushes and combs, not any charge that the brushes and combs were not cleaned, but simply there was not a written procedure established.

THE WITNESS: I see.

(123) That type of violation when I review the file based on individuals providing input my major objective is to look for the areas that substantiate not an area such as brushes but areas that would substantiate a critical negative finding as it relates to treatments being rendered.

I am not going to center in on the brushes. I am going to center on treatment. That is my role, to look at and see if there is substantial documentation. You will always get additional documentation from a surveyor. I must look to see as it relates to meeting standards and what is substantial in that discrepancy.

So the brushes weren't considered as a thing to consider for my recommendation for non-renewal. I looked to see if there were omissions in treatments, medications, the accuracy of administration.

There was one individual who was not authorized under requirements to administer medications. There were medications that were not labeled. These are the substantive discrepancies with standards.

Again, to repeat, not a statement such as brushes or whatever that referred to—

BY MS. HATHAWAY:

Q. What was your conclusion upon review of the file?

A. My conclusion upon review of the file was that there was substantial documentation to address the meeting in a safe and (124) accurate manner the health needs of patients based on conditions not met, and my recommendation was in concurrence with the state agency's recommendation that the agreement should not be renewed.

MS. HATHAWAY: Thank you.

Cross-Examination

BY MR. POSNER:

Q. Miss Campbell, you were in court on July 26, 27, 1977, when this case was first heard by Judge Fullam?

A. Yes, sir.

Q. Did you testify at that time?

A. I did not.

Q. You did not testify.

You heard certain so-called "experts" testify concerning the conditions they found on a peer review, did you not?

A. Yes, sir.

Q. Did you go back or ask that someone go back to verify whether or not the statements they had made in this courtroom were of worth or verified a situation and, if it did, as to whether or not that should have controlled a consideration by your department?

A. That is a decision made by a person, an individual, other than myself; but a reconsideration was indeed entered into—

Q. Let me ask you this—

A. —based on the reports of those witnesses.

Q. You haven't answered my question. Let me try to give it to you more plainly.

(125) Having heard the testimony of these experts, did it not prompt you to make a personal visit to the place to see whether or not there had been changes there over what you believed the situation was before?

A. That is not my decision.

Q. Whose decision is that?

A. The decision is made by the director of the agency responsible for the enforcement of federal regulations.

Q. Can you give us the name, please?

A. It is Dr. Gerald Szuc.

Q. Is that the gentleman that testified here that he had been in the office only about a month at the time you recall his testimony?

A. That is the gentleman who was here.

Q. Well, he had only been with the department about a month in this region, had he not?

THE COURT: Well, his testimony on that subject is in the record.

MR. POSNER: It is a matter of record; that is right, sir.

BY MR. POSNER:

Q. Did you discuss the matter with him as to whether or not an investigation was going to be made?

A. Yes.

Q. Was it made?

(126) A. Through the reconsideration.

Q. Wasn't a re-examination of the premises made since that time?

A. A re-examination of the premises was not made.

Q. And the affidavit that you have taken and submitted to the Court here is a recitation of events over a period of time would you say based primarily on the surveys made by the Pennsylvania Department of Health?

A. Partly on the surveys of the Pennsylvania Department of Health and in July of 1976 a direct federal

survey, which is a survey that applies health discipline from a federal agency.

Q. Let me ask you: You relied on that March 11, 1976, investigation, did you not?

A. Yes.

Q. '77 I mean.

A. Yes.

Q. Did you know that there was an investigation made on June 22 by the Pennsylvania Department of Health?

A. No; I am not aware of an investigation in June of '77.

Q. If I told you at the time that the Pennsylvania Department of Health made its investigation they recommended that a three-month provisional license, as recommended in March 1977, be issued; that it be effective from June 24, 1977, to September 24, 1977; and they stated in their recommendation, "This recommendation is based upon progress which has been made since the March 1977 (127) survey and the May 1977 special visit," were you aware of this recommendation?

(Pause.)

A. No. I cannot recall my being made aware of it just since you have read that.

Q. Do you think you should have contacted the State Department of Health before you reached a decision on your reconsideration as to whether they had any additional information since their inspection of March 1977?

A. As I have indicated—

Q. Just answer my question.

A. Would you repeat it?

Q. Did you think it proper after the court hearing in July of 1977 to make inquiry of the state authorities who were present in this very courtroom as to whether or not they had made an inspection as of June 1977, and what their recommendations were?

(Pause.)

A. No, I did not, unless they were based on their own licensure requirements. We are speaking of federal requirements.

Q. Regardless of what requirements they were, you base many of your decisions on surveys made by them and not by your own team; isn't that correct?

A. As it relates to federal requirements.

Q. So you wouldn't disown at this time a recommendation that they made and accepted only the statements they made prior thereto—

(128) THE COURT: Excuse me—

BY MR. POSNER:

Q. —to the detriment that was placed?

A. Sir, the recommendation would not be made to me. It would be made to the agency direct.

THE COURT: Let's get one thing clear on the record. Are you talking about a recommendation that the state license be renewed or a recommendation by the state agency to HEW?

MR. POSNER: No, sir; I am talking about the state license being renewed.

THE COURT: O.K.

MR. POSNER: I thought that information might have been conveyed to the Federal Government.

THE COURT: Apparently it was not.

BY MR. POSNER:

Q. That in the opinion of the authorities the State relied—the Federal Government having been persuaded by them on a prior occasion might want to change their opinion in its reconsideration.

A. That is licensure. Our bases for determinations are on federal standards.

Q. Don't you—

A. That is a state licensure—

THE COURT: We understand that.

BY MR. POSNER:

Q. Don't you agree with me, Miss Campbell, that the State (129) authorities are interested in the welfare and health of a person?

THE COURT: This is just arguing. Go on to something else. We are trying to find out what the facts are, not make argument at this point.

BY MR. POSNER:

Q. Did you meet Mr. Laff, L-a-f-f, in this courtroom who was the state representative at that time in July of 1977? You know him, don't you?

A. Would you rephrase your question? I do not understand the question.

THE COURT: I don't either.

BY MR. POSNER:

Q. Do you know if Mr. Laff was in charge of licensure for the State Department of Health?

A. Do I know him?

Q. Yes, ma'am.

A. I know him.

Q. Did you see him in the courtroom here in July of 1977?

A. Yes.

Q. Did you discuss with him the fact that he had made another inspection as of June 1977?

A. No.

Q. He never told you that?

A. No.

Q. He never told you that?

(130) A. No.

Q. If you had the benefit of that report as I have read it to you, would that give you some thought in order to inquire as to what they had found so that you might determine whether or not conditions—

THE COURT: Mr. Posner, your questions just don't make any sense. They are rambling. You start out with one question and ask three others and throw in additional circumstances which louse up the first question.

So why don't you take a deep breath and start over again and ask one question at a time, please.

MR. POSNER: Thank you, sir.

BY MR. POSNER:

Q. If you had had the results of the investigation conducted in June 1977, of the State Department of Health, would you have considered their findings before you had reached your determination of the reconsideration of this case?

A. My remarks would be in the form of a recommendation to the head of the unit responsible for enforcement. And based on that type of report because it had to do with licensure and that it was a provisional

licensure for three months, that would not have been substantial enough to change my recommendation with respect to the seriousness of the deficiencies at the nursing center.

MR. POSNER: I have no further questions.

Thank you very much.

(131) THE COURT: Anything further of this witness?

Redirect Examination

BY MS. HATHAWAY:

Q. Ms. Campbell, did you review the reports of consultants submitted on reconsideration by Town Court?

A. Yes, I did.

Q. Did you change your opinion based on those reports?

MR. POSNER: Objected to, sir.

THE COURT: Objection overruled.

THE WITNESS: No.

BY MS. HATHAWAY:

Q. Why not?

A. The reports tended to interpret federal regulations. In some instances they were conflicting in their findings and reports did not give assurance or indicate that there was compliance.

There were some reports not referred to, progress is being made; but we are looking for at this time, based on the seriousness of the conditions, for full

compliance and not misinterpretations of our standards.

MS. HATHAWAY: That is all. Thank you.

THE COURT: Anyone else have any questions?

MR. POSNER: I have finished, sir.

MS. HATHAWAY: That is all. Thank you.

THE COURT: You may step down.

(Witness excused.)

(132) MR. FORSTER: If Your Honor, please, we have in addition a copy, of which I am sure counsel for plaintiffs has seen before, which is a presentment by a special investigating Grand Jury presented to the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Miscellaneous No. 76-00-1646.

It is a public record, and I would hope plaintiffs would have no objection to its going into the record.

THE COURT: The way to find out is to offer it and see.

MR. FORSTER: I do offer it into evidence at this time.

MR. POSNER: I will object, of course, sir.

The procedure here at the present time is whether we are entitled to temporary injunctive relief pending administrative determination as to the fitness of this place to be used.

THE COURT: What do you offer the presentment to establish?

MR. FORSTER: Your Honor, I simply intended to establish that the Town Court Nursing Center has been of sufficient concern to more jurisdictions, if you will, than the Federal Court, sufficient that the investigation—

THE COURT: I don't want your argument. I want to know what it shows.

Does it show the Grand Jury was concerned about handling the finances, the Grand Jury was concerned about conditions they inspected and found?

(133) MR. FORSTER: Yes, sir. The Grand Jury heard direct testimony from people who were familiar with the operations at the Center, and they were concerned about patient care. They recommended a presentment—they recommended an information charging the Nursing Home with recklessly endangering the welfare and health of the patients.

THE COURT: As of what date?

MR. FORSTER: This was returned May of this year, sir.

THE COURT: When was the evidence presented?

MR. FORSTER: It was a continuing investigation, Your Honor; and I believe it went back into 1976. It went on for a period of time.

So that the testimony presented to the investigating Grand Jury touched and concerned events which took place at a varying number of times.

MR. POSNER: The witnesses, sir, who are not subjected to cross-examination by us, now my friend

would like to get a presumption of guilt based on that type of evidence even before we have had our actual hearing in court.

A preliminary hearing has not as yet been held, and I submit to Your Honor for that reason this is certainly not proper at this time because the issue before Your Honor is a limited one at this moment, as I see it.

THE COURT: Well—

(134) MR. FORSTER: I appreciate that, Your Honor.

THE COURT: Relax. The objection is overruled. The document will be received for what it is worth. That doesn't necessarily undercut your argument.

(A 26-page document entitled "Fourth Presentment" by the Special Investigating Grand Jury of April Term, 1976, Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, was marked and received in evidence as Defendants' Exhibit No. 8 for identification.)

THE COURT: May I see it, please?

(Document handed to the Court.)

(Pause.)

THE COURT: Anything further from anybody?

MR. POSNER: Yes, sir. I have testimony when the Government is finished its case.

MR. FORSTER: That is all we have, sir.

MR. POSNER: Mr. Lewis, would you take the stand, please.

Is the oath still in effect?

THE COURT: He has testified previously, and he is still under oath.

MR. POSNER: Mark this.

(A one-page letter from Mr. Laff, Pennsylvania Department of Health, to Mr. Lewis, Administrator, Town Court Nursing Home, dated July 29, 1977, with attached six-page report, was marked (135) Plaintiffs' Exhibit No. 12 for identification.)

DONALD LEWIS, previously sworn.

Direct Examination

BY MR. POSNER:

Q. Mr. Lewis, as of June 22, 1977, was there an inspection made by the Pennsylvania Department of Health of Town Court Nursing Home?

A. Yes, sir, on June 22.

Q. And under date of July 29, did you receive a letter from the Directors of the Division of Long-Term Care with regard to that inspection?

A. Approximately I think.

Q. I show you what has been identified here as Plaintiffs' Exhibit No. 12 (handing to witness).

A. Yes, sir. That is it.

Q. So that the record may be clear, Plaintiffs' Exhibit 12 is a document you received from the Department of Health, Commonwealth of Pennsylvania, and it is dated July 29, 1977?

A. Yes, sir, it is.

Q. And it refers to this review of June 1977?

A. Yes, June 22.

MR. POSNER: Cross-examine.

MS. HATHAWAY: We have nothing, Your Honor.

(136) MR. POSNER: May I offer the Plaintiffs' Exhibit 12 in evidence?

THE COURT: You just did, I believe. At any rate, yes, it will be received.

(Plaintiffs' Exhibit No. 12 received in evidence.)

MR. POSNER: Thank you, sir.

That is all, Mr. Lewis.

(Witness excused.)

WILLIAM J. JONES, previously sworn.

MR. POSNER: Mark this P-13.

(A five-page report from William Jones to Leonard Coyle, undated, marked Plaintiffs' Exhibit No. 13 for identification.)

Direct Examination

BY MR. POSNER:

Q. Mr. Jones, at the time of your former testimony here I neglected to ask you concerning your position in New Jersey and the responsibilities of that position. What is that?

A. I was the Director of the Division of Medical Assistance and Health Services, Medicaid.

Q. On behalf of the Federal Government?

A. State government.

Q. And were you in any way connected with the collection or the making of the standards for the State of New Jersey?

(137) A. Yes, sir, I was. From January 1969, I was pretty much the Medicaid program in New Jersey. As such, I had a responsibility to develop the standards for all health services, including skilled nursing homes, to handle the reimbursement, reset up the entire Medicaid program, including the computerization program integrity, standards, etc.

I can say with some little pride that the Federal Government recognized our program as one of the best in the country.

Q. Now, with all of that background, sir, having already told us about a visit, a peer review of Town Court Nursing Home at the request of Mr. Coyle, did you make another inspection of Town Court Nursing Home and, if you did, when?

A. On August 10, 1977, sir.

Q. Now, what was the purpose of that visit, sir?

A. The purpose of the visit was to follow up on my previous findings and recommendations and to review the federal standards and the state standards to see whether or not the home was in substantial compliance with those standards.

Q. Were you aware at that time, sir, of the findings of the Department of Health insofar as its inspection of June 24—June 22, 1977?

A. Yes, sir; I was given a copy of that report.

Q. And did you summarize all of your findings of this visit, sir, in a document that has been marked Plaintiffs' Exhibit 13, (138) which I will hand to you at this time, sir (handing to witness)?

A. Yes, sir.

Q. And in that document, sir, you have taken into consideration all of the federal regulations and standards, do you not?

A. Yes, I have, sir.

Q. And, sir, I have only one question of you now.

With all of your experience and background in your opinion would the lives or the safety of the patients now confined at Town Court Nursing Home be endangered to any extent whatsoever—

A. Absolutely not, sir.

Q. Let me finish the question.

A. I am sorry.

Q. —by a continuation of their stay there going forward?

A. Absolutely not, sir.

If I may—

Q. Go ahead.

A. —I am quite chagrined to hear interpretations of what the various programs are. Standards for programs are contained in the Bible, the long-term care manual. And if anyone is familiar with this manual, there are standards and there are interpretations and guidelines.

And this manual issued by the Federal Government gives a standard and then says how you should interpret it. So there are interpretations involved here.

I am also a little bit chagrined to see that a program (139) and the Federal Government's intent in the Medicare/Medicaid program wherein inspectors are supposed to be professionals and are supposed to assist the facilities in overcoming deficiencies and are supposed to recommend consultants to the facilities. The

whole philosophy in this book I don't find being followed as far as the survey of this facility is concerned, at least within the last year.

Q. You have already told us, Mr. Jones, concerning the fact that you are aware of the provisional license issued by the State because of the inspection of June 22?

A. Yes, sir.

Q. Will you tell us in what respects or are there any substantial differences between the standards set by the State and Federal Government with regard to issuances of licenses?

A. Well, the Title 18 program, the Title 19 program, and the Licensing within Pennsylvania are within 99.9 percent similar.

So that if a license were given one should assume and could presume that the standards for licensing were met and, therefore, the standards for Medicare and Medicaid were substantially in compliance at that particular time. Otherwise, I wouldn't see any reason for giving a license.

MR. POSNER: Cross-examine.

Cross-examination

BY MS. HATHAWAY:

Q. Mr. Jones, what can you tell us of the conditions at Town (140) Court in March of 1977?

A. In March of 1977?

Q. Yes.

A. I can tell you nothing from personal observation except what the survey report indicated.

Q. Can you tell us if your visit in June 1977, if anyone at Town Court Nursing Home was aware of your visit in June of 1977, before you arrived?

A. I couldn't answer that.

THE COURT: Did they know in advance you were coming?

THE WITNESS: I presume so. I was asked by counsel, Mr. Coyle.

BY MS. HATHAWAY:

Q. Do you think that might have any effect on the operation of the facility?

A. I don't think so. It has been my experience that you can't clean a facility, you know, within 48 hours. You can't do some of the things whether you know somebody's coming or not.

Obviously if you are a good surveyor and a good inspector you have a pretty good idea what has been freshened up and painted over within the days preceding your visit.

If I may, you know, the place was clean; and in my first visit I asked relatives and patients whether or not this was a phenonemon that occurred within the recent past or had the facility been cleaned as it was today and for weeks and months (141) past. And the answer I got was it was clean and it is always this way. So I presume they didn't polish it up for my visit.

Q. Was your visit on August 10 announced or unannounced?

A. As far as I was concerned it was unannounced. I don't know whether or not they knew I was coming.

Q. But the attorneys for Town Court knew you were coming?

A. Certainly. I presume so, yes.

Q. Would you say that the grant by the State of a provisional license is indicative at all if conditions for licensing in the state are met?

A. Number one, when you talk about conditions, I have heard full compliance of all the standards.

The language of the law and the intent, particularly in the Title 18 program, talks about substantial compliance. And as such, it means that on any given day no facility, health facility, in this country is 100-percent in compliance.

Q. I am talking about state licensing.

THE COURT: He is getting to it, I think.

THE WITNESS: So the fact is when the people came in and the report I saw from the state survey team they said: "Yes, we recognize progress and we are recommending a provisional license," which is a technique used.

In most jurisdictions you give a provisional license when you recognize progress and you want to assure that there is continued progress before you give full licensing. That is my (142) experience. On that basis, I would say that the survey team recommended progress.

BY MS. HATHAWAY:

Q. Do you know how long it has been since Town Court has had a regular unconditional license?

A. No, I do not.

MS. HATHAWAY: Thank you.

MR. POSNER: Thank you, sir.

THE COURT: Anyone else?

(No response.)

THE COURT: Thank you, sir.

(Witness excused.)

MR. POSNER: That is my rebuttal.

THE COURT: Any further evidence from anybody?

MS. HATHAWAY: No, sir.

THE COURT: Any further argument from anybody?

MS. HATHAWAY: Yes, sir. We would like to repeat our basic contention which seems buried in the midst of evidence going on this morning, which is that this facility has been in and out of compliance since it first entered the program in 1967; that we have given them innumerable opportunities to comply; that they have not; and that we are here as our last—this is our only method of enforcing the statute and regulations.

There is a definite patient problem. There is a (143) problem about what to do with the patients, but we don't see—

THE COURT: What about due process? At what point do they have an opportunity to contest this?

MS. HATHAWAY: We agree with that issue extensively. We feel that the Supreme Court in Mathews v. Eldridge disposed of that question in stating that a predetermined hearing is not required by due process in a Title 2 case, which we feel is a more sympathetic case than is the case before the Court. In that

case was involved a man's only livelihood. In this case we are talking about a nursing home reimbursement.

But I refer the Court to our brief. I think we discussed both our jurisdictional concerns and our position that due process has been afforded the facility both in the initial determination by the Bureau of Health Standards and Quality and the reconsideration process which was done by the central office of that Bureau and done after invitation and submission by plaintiffs of whatever evidence they chose to offer.

We feel the Supreme Court's exposition of the content of due process in these situations has been met.

THE COURT: What in your view is the purpose of any hearing before an administrative law judge if the cat is out of the bag before he even gets the case?

MS. HATHAWAY: Well, that was the problem in the Matthews v. Eldridge case. It was even more of a problem because a man could have starved to death or at least was forced to go— (144) apply for welfare benefits. And the Supreme Court said that no predetermination hearing was required. They said the internal procedures of administration were sufficient to protect the interests.

THE COURT: Well, they ought to be, that is for sure.

MR. POSNER: That was a disability case my friend refers to which the Supreme Court recognized the disability provisions of it and suggested that the patient wouldn't be harmed because during the interim the patient or complainant would be on relief from the federal authorities and getting sustenance in that fashion and support.

MS. HATHAWAY: Your Honor, but it is the same act, the same procedures, the same bureaucracy administering the program.

THE COURT: I certainly hope not.

Anything further?

MR. POSNER: I have nothing further, sir.

FULLAM, J.:

I may state that the primary purpose of the Court in this proceeding is apparently not capable of being realized.

Let me comment upon the evidence which has been presented both at the previous hearing and today. I am absolutely convinced that nobody in the administrative end of HEW who is involved in this case so far as a party here has the faintest idea of what they are doing.

I am persuaded that somebody got all upset with very (145) good justification about complaints of conditions which existed back in 1975, at the latest, or early in 1976, and about financial irregularities. It is absolutely clear to me that anybody in his right mind would conclude that the patients at Town Court Nursing Home are better off there than they would be anywhere else in the foreseeable future.

I am also satisfied that the evidence which has been presented this morning by the first witness sounded more like a memorized recitation than testimony about facts. It was full sweeping conclusions and gobbledygook, which makes no sense. The ultimate conclusion was simply the alleged reconsideration of this case was

a conclusion that there was adequate documentation or sufficient documentation to substantiate the issue.

It is obvious to me that the taxpayers would have saved a lot of money if instead of all the time that has been wasted in review of documentation and appearance here in this proceeding and somebody has simply gone over and looked the place over. It is quite apparent to me that people are much more interested in sustaining previously stated positions, in dotting I's and crossing T's, than they are in actually carrying out sensibly the very beneficial program having to do with nursing homes.

Having said all that, I nevertheless reluctantly conclude that in view of the position taken by the Government, a (146) position which I frankly do not understand and never will, there is nothing that the Court can do about it.

If the administrative bureaucrats persist in being blind to facts, if they persist in looking at documents instead of institutions, if they persist in looking at regulations instead of facts and events, there is nothing the Court can do about it.

It is obvious to me that the outcome of the administrative review is a foregone conclusion. But it is equally obvious to me this is a matter in the control within the administrative agency and not within the control of the Court.

Therefore, it seems to me the long and short of it is that the bureaucrats will wind up with having to stew in their own juice.

I have attempted to make it possible for them to review this matter and arrive at a solution which will be

beneficial to the patients involved. That has not borne fruit. It will be up to them to cope with the needs of these patients in some fashion, which I hope will bring them to a realization of the problem.

The Motion for Continuance of the Preliminary Injunction is denied except as follows:

The defendants are restrained from disapproving Medicare and Medicaid payments to those patients who are in the Home now and otherwise entitled thereto, so long as they remain patients in the home.

(147) The effect of this will be that the plaintiff, Town Court Nursing Home, is not to be required to maintain patients without their being entitled to Medicare payments for those patients who are there.

If the powers that be in the bureaucracy wish to move the patients out, that is their privilege. They are going to pay for them while they are there, and it will be up to them to arrange alternative locations for them.

All of this is denied and the preliminary injunction, of course, is without prejudice to a reconsideration of the matter by the appropriate officials if there can be anyone prevailed upon to have enough enlightenment to look at the current situation and make a current judgment and not look at papers and make a bureaucratic judgment based upon what is on paper and what may have existed in the past.

This hearing is concluded.

(Concluded at 11:22 a.m.)

PLAINTIFFS' EXHIBIT NO. 12

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

P.O. Box 90
Harrisburg 17120

Leonard Bachman, M.D.
Secretary of Health

July 29, 1977

Mr. Donald B. Lewis
Administrator

Town Court Nursing Home
1526 Lombard Avenue
Philadelphia, Pennsylvania 19146

Dear Mr. Lewis:

Enclosed is a copy of a visit made to the Town Court Nursing Home on June 22, 1977, as a follow-up to the March 11, 1977, licensure visit. A visit was requested, by me, as a means of monitoring your actions as described in my April 26, 1977, letter to you.

At a meeting in the Health Department Office in Harrisburg, on July 14, 1977, attended by Mr. Veloric and Counsel, a request was made for a copy of this visit. Inasmuch as the only copy available was a working document, it has been retyped and is herewith enclosed.

Recognizing that it may not get to Mr. Veloric and your attorney by Monday, August 1st, in time for the 1:00 p.m. meeting scheduled in the Health Department Office in Harrisburg, I am retaining copies and will distribute them also at that meeting.

I hope this meets with your approval.

Sincerely,
Jay E. Laff, Director
Division of Long Term Care

Enclosure
cc: Mr. Jennings
Miss Stiller
Mrs. Poppert
Mrs. Bell
Mr. Fasig
Facility File

July 26, 1977

Town Court Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Visited and Reported by:
Judith Folan, RN
Constance Garner, RN
Donald Whitko, RN
Claire Richards, RN
Lois Maunz, RD
Field Representatives

A follow up of the March 11, 1977 licensure visit was made to Town Court Nursing Center on June 22, 1977 as requested by Jay E. Laff, Director-Division of Long Term Care. The findings are as follows:

Governing Body and Management

There has been substantial progress made in providing effective overall management. This was evi-

denced by the improvements noted in patient care and related services.

The facility was observed to be clean and well maintained at this time. Attempts have been made to implement policies and procedures previously developed. The frequency of staff development programs has increased and emphasis was placed on areas where deficiencies were previously noted, including patients rights.

Medical Services:

Medical direction appears improved since the time of the March licensure visit. The medical direction consultant committee met on March 23, April 20, and May 27, 1977 chaired by Dr. Barry Chase D.O., Medical Director. All staff physicians are requested to attend these sessions. In those instances where physicians do not attend the meetings written communication via mail. A copy of the State regulations and a list of deficiencies resulting from the March survey were provided to all medical staff members. Emphasis during meetings was placed on both the regulations and physician service deficiencies. The May meeting also resulted in the development of a policy to provide podiatry services on a "p.r.n." basis. Incident and accident reports are also reviewed at each meeting. (a total of thirty-five incidents have occured within the last nine weeks). Conclusions or recommendations resulting from these reviews were not noted.

It is unclear as to whether the improvements noted are due to the efforts of the Medical Director or administrative staff.

Physician services appeared to have improved. Orders and progress notes were available for most patients for the last 3 month period. Long and short term goals, and rehabilitative potential were also listed. A few telephone orders had not been countersigned and occasionally a progress note was not available at the time of a physician's visit, however these deficiencies were primarily observed in the closed records reviewed. The main problem appears to be a lack of substance or appropriateness in the documentation being provided. Goals are very general and progress notes do not always correspond to factual information provided elsewhere in the record. Another problem still appears to be the absence of a date to correspond with the physician signature, this appears to be limited to a few physicians. In general overall improvement in physician services would have to be acknowledged.

Although patients basic needs appeared met and medical records have improved since the previous visit, the appropriateness of the medical care being provided could not be thoroughly assessed.

Dental Services

A new dental consultant has begun evaluations on the patients. This is being accomplished on a priority basis. Documentation was available on the patients medical record to substantiate this.

The agreement with this consultant has not been signed.

Physician orders were not available for the patient to be seen by the dentist.

Nursing Services

Improvements were noted in the appearance of the patients. Patients observed were neat, clean, hair was groomed, men were shaven, nails (finger and toe)

were manicured. Mouth care for the patients was being provided. Personal equipment (powder, combs, brushes, toothbrushes, toothpaste, deodorant) were available. All but a few patients had undergarments. Those not having underwear either did not wish to wear these garments or it was documented on the medical record why undergarments were not being worn.

One patient on the third floor was observed in urine soaked clothing at 10:45 a.m. This patient was in the same soiled clothing at 3:45 p.m.

Five (5) patients were observed without identification bracelets.

Rehabilitative nursing has been initiated for some patients. There are seventy-five (75) patients who are incontinent. Fifty-nine (59) are on an individual training program. There is lack of documentation to support the follow thru and assessment of progress being made. Daily records are kept at the patients bedside. These records are collected and supposedly summarized in the monthly nursing summary, however, there were vague notes on some records and other records lacked any reference to the bowel and bladder training program. Documentation of patients being instructed in activities of daily living was not available.

Baked chicken served to patients was in quarters. Patients with paralysis had difficulty trying to disjoint and eat the chicken. Adaptive equipment (spoons, plates, forks, knives) were not provided for these patients. Assistance for these patients was not provided in a timely fashion.

Rehabilitative exercises were not documented as being performed for stroke patients and/or amputees. Patients with paresis were out of bed were not provided with support to afflicted extremities.

Intake and output records were not maintained on all patients who were on diuretics. One patient was ordered force fluids by the physician. There was incomplete documentation and missing reports of this order being followed. The intake record on Mrs. Ellen Eard indicated the following:

6/15, 6/20—no documentation
6/18, 6/21—documentation recorded for 7-3 shift only
6/17—intake 820cc
6/18—intake 450cc
6/19—intake 740cc

This does not indicate that fluids were being forced as ordered.

The scale which was purchased to weigh non-ambulatory patients was reportedly broken. Routine weights were not available for non-ambulatory patients.

Call bells were available and within reach of patients.

Nursing care plans do not indicate the specific condition of the patients. (i.e. no documentation for adaptive equipment (braces, special shoes). All needs are not identified. Documentation to indicate progress towards reaching goals is not maintained.

The facility currently has a registered nurse supervisor assigned to each floor on the day shift. This is in addition to the charge nurse.

Dietetic Services

A review of dietary services revealed that meals served to patients are attractive and nutritionally adequate to meet the needs of all patients.

Therapeutic diets are served as planned on the menu and as ordered by the physician. A proper identification system is available to ensure that each patient receives diets as ordered.

The storage, preparation and serving areas were clean and in good order. A full time qualified food service supervisor is responsible for the overall dietetic service programs.

The consulting dietitian is present in the facility at least seven (7) hours a week. Through her conscientious efforts and showing of specialized dietary information with the nursing & medical staff she has been able to integrate the dietetic aspects of patient care with the total plan of patient care.

Rehabilitative Services

Rehabilitative services are substantially in compliance. A contract has been established for speech therapy.

Lab/X-Ray Services

Physicians are currently writing orders for laboratory and radiological tests. Test results are being conveyed to the attending physician in a timely fashion. The results of abnormal laboratory studies is being documented by nursing personnel as to the time, date, physician notification and the name of the person doing the notification.

Social Services

A social service consultant has been obtained. Pertinent rates were available on the majority of the records reviewed. One closed record showed lack of follow thru in contacting a close friend (person designated to be contacted on medical record). When the patient had a change in status.

There is a new form which has been instituted for use by Social Service personnel.

Patient Activities

The designated staff member for the patient activities program is qualified in therapeutic recreation and has recently been provided with an additional full-time staff member to aide in the implementation of the designed activity programs. The overall activity program is progressing towards its goal of creating an environment that provides physical, intellectual, social, spiritual and emotional stimulation. This program is newly developed. There is still the need for expansion in order to meet the needs of all the patients.

All documentation by the activities staff is retained in the recreation area. Individual goals and patient assessments were not available on medical records. This does not provide the attending physician as well as the nursing personnel information on the patient's participation in the various activities and significant changes in his/her response to the activities program.

Pharmaceutical Services

The consulting pharmacist spends eight (8) hours per month in the facility to review 198 charts. He initials his monthly review.

It is questionable that the pharmacy provides 24 hours service as evidenced by a patient being admitted at 9:30 a.m. and several medications were ordered from the pharmacy room. Staff interviewed reported that they would have to borrow medications from other patients and the pharmacist would not provide the medicines until the following day at 4:00 p.m. the D.O.N. claimed that this was not true and did secure the medicines that day at 6:00 p.m.

Either nursing personnel are not familiar with the procedure to secure medications or the pharmacy is not providing service on a 24 hour basis.

Transfer Agreements

Transfer agreements were available with seven (7) area hospitals under which inpatient Hospital care is available promptly to the facility's patients when needed. An agreement with the Ivyridge Nursing and Convalescent Home for intermediate care was signed and available for review.

Medical Records

Medical records were reviewed for the past three months (April, May & June). The medical records consultant spends four (4) hours per year in this facility. At the time of the last visit a total of four (4) records were reviewed by this consultant.

Current records reviewed (thirty-five (35)) showed marked improvement although sporadic deficiencies were noted: The amount of documentation has increased considerably however the quality of content is still in need of improvement.

Three (3) closed medical records reviewed lacked an admission progress note on a patient transferred

from the hospital, physician's signatures covering verbal orders, final disposition of medications and personal effects, and notification of family.

The medical records consultant does not provide an adequate number of hours as evidenced by the continuing lack of documentation on the medical records reviewed.

Physical Environment

The facility was neat and clean. The urine odor which was prevalent during the post surveys was not evident.

Cubicle curtains in all patients rooms were not long enough to insure privacy for patients.

The pantry areas on each floor are also being utilized as supervisors offices. The rooms that were formerly day rooms are now dining rooms and vice versa. Written approval for this change was not available.

Infection Control

Flies were observed on the second (2) and fifth (5) floors.

Personal clothing was folded in the laundry and stuffed into plastic bags. This manner of handling patients clothes causes wrinkles and creases. Provisions are not made for ironing patients personal clothing in the clothing which the patients must wear. One (1) employee collects, launders, folds and distributes personal clothing. After delivery to the patients unit (4th floor), clothing was observed being sorted on the counter at the nurses station. This area is used for charting and not designated as laundry sorting/folding area.

Disaster Preparedness

A fire drill was held as requested by the survey team at 11:30 a.m. Substantial improvement was obvious. Response for the most part was immediate and appropriate with all staff, in all departments. Patients were removed to evacuation points; doors and almost all windows were closed; doors to patient rooms were flagged with towels and/or pillow cases to note patients remained within. Each staff member appeared to carry out a specific role under appropriate direction. Charge nurses obtained all patient kardex information placing it on top of medication carts. These were also moved to evacuation points. Patients appeared familiar with their roles many began moving immediately without verbal prompting.

One substantial error was noted involving a visitor. This person was blind and accompanied by a sight dog. During the drill the visitor was ignored and allowed to wonder in patient corridors while all staff hustled and evacuated around this person. The visitor was not informed or given assistance at anytime during the drill.

The facility has recently obtained an agreement with Mr. James Baker, an independent contractor, to provide educational assistance and supervision relating to fire drills and disaster planning.

Recommendation:

It is recommended that a 3 month provisional license, as recommended in March, 1977, be issued. This would be effective from 6/24/77 to 9/24/77.

This recommendation is based upon progress which has been made since the March, 1977 survey and the May, 1977 special visit.

The facility should be monitored on a monthly basis to assure continued efforts towards total compliance and providing quality care. A physician should accompany the survey team in order to evaluate the quality of medical care actually being provided.

PLAINTIFFS' EXHIBIT NO. 13

Mr. Leonard Coyle
332 West State Street
Trenton, New Jersey 08610

Dear Mr. Coyle:

At your request, I again visited the Town Court Nursing Home on August 10, 1977. The purpose of the visit was to evaluate the progress being made at the center to meet the standards and regulations under the Medicare and Medicaid Programs.

In addition, I spent considerable off-site time reviewing the standards and regulations for long term care facilities published by the Office of Medical Programs of the Department of Public Welfare, Commonwealth of Pennsylvania. This document represents the Pennsylvania Title 19 standards.

During my visit I used form SSA 1569 (10-74) Medicare Medicaid Skilled Nursing Facility Survey Report as a basis for my review. Further, I spent considerable time inspecting policy and procedure manuals, reports of meetings and inservice training sessions. Several staff members were interviewed, including the Director of Nursing, the Assistant Director of Nursing, inter alia. Patients were observed and several interviewed.

Findings

1. Compliance with Federal, State and Local Laws (405.1120):

As of August 10, 1977 the Town Court Nursing Center is operating under a provisional license issued by the Pennsylvania authorities. This license expires September 24, 1977 and was issued based on improvements made by the Town Court Nursing Center as noted on June 22, 1977 by the inspection team of the Pennsylvania Department of Health.

2. Governing Body and Management (405.1121):

This facility is in substantial compliance. There are, however, needed improvements as follows:

(A) *Sections F48, 49, 50, 51, 52*—The ongoing educational program is not fully effective. All nursing personnel have not received instruction in patient care techniques such as bowel and bladder control. Physical restoration and restorative nursing techniques are unknown to some staff members.

Not all employees received orientation (F50) as demonstrated by my interview with an attendant newly employed who claims to have received no orientation at all. Nor could I find any documentation of a viable orientation program.

Inservice training in all disciplines needs improvement by cross training one discipline with another.

Recording of sessions must be made more accurate

(B) *Section F56*—All agreements with outside resources must be amended to specify that the facility assumes professional and administrative responsibility for services rendered.

(C) *Section F66*—All Nursing Staff have not been trained and involved in implementation of patient rights policies.

(D) *Section F69*—Compliance with this section is not always or fully documented.

(E) *Sections F81, 82, 83, 84, 85, 86*—This facility is probably most vulnerable to criticism because of its lack of functional policies to define and ensure good or at least acceptable care. What policies exist, particularly nursing policies, are discoordinated, woefully incomplete, and appear to be somewhat of a "cut and paste" nature.

3. Medical Direction (405.1122).

In compliance with exception of F100. Since patient care policies are not adequately spelled out, it is impossible to assure execution of said policies.

4. Physician Services (405.1123).

In compliance. Continued review is urged to assure that progress is maintained.

5. Nursing Service (405.1124).

In compliance except for F128, 136, 170, 171, 172, 174, 175, 176.

F128—Nursing Policy and Procedure Manuals are not adequate to assure good or acceptable patient care. The Director of Nursing is not given the authority nor responsibility to develop an ac-

ceptable manual. It appears to this author that most of the deficiencies in this section are generated by a lack of professionally adequate policies and procedures. Also, what little is available is not used to train staff.

6. Dietetic Service (405.1125).

Not evaluated by this author.

7. Specialized Rehabilitation Service (405.1126).

In compliance.

8. Pharmacy Service (405.1127).

In compliance—See report of Mr. Jess Gaynor.

9. Laboratory and Radiologic Services (405-.1128).

In compliance.

10. Dental Services (405.1129)

In compliance except F305. Agreement not signed.

11. Social Services (405.1130).

In full compliance.

12. Patient Activities (405.1131).

In compliance. Program needs to be expanded in scope and availability. Present program, in my opinion, is marginally in compliance.

13. Medical Records (405.1132).

Not reviewed.

14. Transfer Agreement (405.1133).

In full compliance.

15. Physical Environment (405.1134).

In substantial compliance, except for F389. Facility has requested waiver for visual warning signal. No decision has been rendered at this writing.

16. Infection Control (405.1135).

Not reviewed.

17. Disaster Preparedness (405.1136).

In substantial compliance. Continued effort in training and drills is necessary.

18. Utilization Review (405.1137).

Insufficient available time to evaluate at this visit.

General Observations

1. *Physical Plant*

The facility continues to be neat and clean. No urine nor strong disinfectant odors were discernible. Patient beds, linen and clothing appeared clean and fresh.

Improvement was noted in maintenance activities. Most of the maintenance problems observed during my June visit were corrected. However, several additional small items were noted. Overall, the housekeeping and maintenance departments have performed very well.

The cubicle curtains listed as a deficiency because of their length were still not replaced at this visit. There is no reason why this constant source of deficiency should remain. The Corporation must expedite.

2. *Patient Care*

Care generally continues to be good. Patients were neatly and cleanly dressed. Personal

grooming appears good, although two (2) male patients were observed to be desperately in need of shaving.

Restorative nursing, physical restoration, and bowel and bladder training programs appear to need refinement and reinforcement. Staff comments and treatment records demonstrate this need. My personal observations confirm the need for improvement in this area.

Respectfully submitted,

(s) William J. Jones
William J. Jones

WJJ:DG

DEFENDANTS' EXHIBIT NO. 7

[Note: Defendants' Exhibit No. 7, Affidavit of Claudette V. Campbell, appears supra, pp. 30a-35a, and therefore is not repeated here.]

DEFENDANTS' EXHIBIT NO. 8

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

Misc. No. 76-00-1646

IN RE: The Petition of F. EMMETT FITZPATRICK
District Attorney of Philadelphia

FOURTH PRESENTMENT

To The Honorable Charles P. Mirarchi, Jr., Presiding Judge:

We, the Special Investigating Grand Jury of April Term, 1976, and thereafter, duly charged by the Court to investigate allegations of criminal conduct on the part of such agencies, both public and private and their officials and employees who are involved with the supervision, regulation, and inspection of nursing homes and boarding homes in the City and County of Philadelphia, having obtained knowledge of such matters from witnesses sworn by the Court and testifying before us and finding thereon reasonable grounds to believe, and so believing, upon our respective oaths not fewer than twelve concurring, do hereby make this Fourth Presentment to the Court:

The Fourth Presentment represents the investigation conducted by this Grand Jury into the operation of the Town Court Nursing Center, 1526 Lombard Street, Philadelphia, Pennsylvania. Town Court is a wholly owned subsidiary of Geriatric and Medical Centers, Inc. Geriatric and Medical Centers, Inc. owns and operates eight nursing homes. It is the largest owner of nursing homes in the City of Philadelphia with assets in excess of $10,000,000.00. We felt that an examination of a skilled nursing facility, such as Town Court, which is relatively new, would provide a contrast to the older, smaller and privately owned nursing home which was the subject of our Third Presentment. However, we were wrong. The care offered by Town Court was not only sub-standard, but also placed patients in substantial danger of serious bodily injury and death.

Town Court was built in 1967. A new wing was added in 1975. It has 200 beds. Town Court holds itself out to the public as a skilled nursing center. The law defines such a facility as one which offers nursing care and related medical and health services to people, who, because of age, illness, disease, injury, convalescence, or physical or mental infirmity, need such care. For its services as a skilled nursing facility, Town Court receives $608.00 per month per medical assistance patient from the State Department of Public Welfare.

When we examined the record which we established through civilian and medical testimony, medical records, and other documents, we had no alternative but to recommend that District Attorney F. Emmett Fitzpatrick institute appropriate criminal action.

I. RECKLESSLY ENDANGERING THE LIVES OF PATIENTS

The standards for patients care in a skilled nursing home such as Town Court, are set forth in regulations promulgated by the State Department of Public Welfare. Department of Health Regulations 1328 and 1329 require skilled nursing facilities to employ a medical director who "shall be responsible for the overall coordination of the medical care in the facility to ensure the adequacy and appropriateness of the medical services provided to patients . . ."

In addition to the Department of Health regulations is the Crimes Code of Pennsylvania §2705, Recklessly Endangering Another Person, which is defined as follows:

> A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

The initial impetus for our investigation of the Town Court facility was provided by two horrible incidents, the Landsbury and Levin cases, which clearly reflected violation of the State Department of Health regulations and §2705 of the Pennsylvania Crimes Code. Town Court, even to the present date, has failed to comply with Department of Health regulations by employing a medical director personally responsible for coordination of patient care (N.T. October 7, 1976, page 24).

Town Court relied on Administrators, with no medical training, to insure residents were receiving proper

medical treatment.* (N.T. October 7, 1976, page 22.) One of the Administrators, John Holbrook readily admitted that when a medical problem was brought to his attention, "I don't really report the medical problem to anybody specifically. I do my best to take care of it." (N.T. October 7, 1976 page 21.)

During Holbrook's tenure as Administrator, at least twelve residents of Town Court were hospitalized because of improper, sub-standard treatment. Nine of them died. By failing to provide any medical direction to its employees and/or by failing to coordinate medical care to its residents, Town Court acted in a reckless manner.

Town Court held itself out to the public as a skilled nursing center. Over the years, Town Court received millions of dollars from the State to care for the aged who are infirm. Instead of operating a health care center which protected patients, it jeopardized their lives on a daily basis. In two of the worst cases, Town Court's reckless conduct caused Ralph Landsbury, 84, to lose his penis, and David Levin, 85, to lose his right leg.

THE LANDSBURY CASE

Gwendolyn Nelson testified on February 9, 1977. She stated that she was employed by Town Court as a licensed practical nurse for the 11:00 P.M. to 7:00 A.M. shift. On February 27, 1976, she attempted to obtain a urine sample from Mr. Landsbury. He was uncooperative. In accordance with the procedure

* During the two year period January 1975-December 1976, Town Court had a total of six administrators.

which had been established to handle incontinent and/or uncooperative patients, she used wrist restraints on Landsbury and placed a urosheath on his penis and tied it in place.[1]

On February 28, 1976, Landsbury, who had been a continuous resident of Town Court from December 22, 1971, was admitted to Graduate Hospital with advance gangrene of the penis caused by the improper application of a urosheath by employees of Town Court. What should have been a simple matter of observation turned into a catastrophe, as the urosheath had been left on Landsbury's penis for too long a period of time. The examining physician at Graduate testified that the resulting gangrene had been allowed to fester for a period of twenty-four to forty-eight hours. Landsbury's penis had to be amputated. By the end of his stay at Graduate, Mr. Landsbury was walking and eating by himself; speaking with the staff; and had even grown a mustache, all of which indicated to his attending physician that he had renewed his interest in life.

On April 21, 1976, Mr. Landsbury was transferred back to Town Court from Graduate in "satisfactory condition". Nine days later, on May 2, 1976, Landsbury was readmitted to Graduate Hospital, his condition described as severely dehydrated and malnourished.

[1] Nelson further testified that when urosheaths were unavailable, rubber gloves held onto the penis by rubber bands were used. To obtain urine samples from incontinent women patients, cotton balls were placed near the vagina, then the cotton was squeezed into the urine specimen bottle.

One of the Graduate Hospital nurses described Landsbury's condition as follows:

> This time he was so severely dehydrated in such a short period of time, meaning nine days, that he developed sores in his mouth and you only get that when you are extremely dehydrated, and I mean extremely dehydrated. (N.T. July 28, 1976, page 71.)

Town Court records show that Mr. Landsbury was not treated by a physician during the nine days from April 21, 1976 to May 2, 1976. Town Court's records were devoid of orders for his care, treatment, or medication. Graduate Hospital revitalized Landsbury once again, and returned him to Town Court on May 9, 1976. He died there on May 17, 1976.

THE LEVIN CASE

David Levin, age 85, injured the big toe on his right foot on November 9, 1975. Francis Vita, a podiatrist under contract with Town Court, removed the nail plate of the injured toe on November 20, 1975. The following nurses' notes appear in Town Court records:

> 12-15-75: patient has reddened swollen rt. leg c gangrenous big toe, complained pain.
> 1/2/76: . . . and toes on rt. foot which really looks bad.

On December 29, 1975, Vita again trimmed Mr. Levin's toe nails.[2]

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[2] Vita could not explain to this Grand Jury how he could have trimmed Mr. Levin's toe nails on December 29, 1975 and not notice the gangrene setting in.

On January 6, 1976, a physician was finally consulted. He wrote in the Town Court records that for two weeks, a nurse noted discoloration of the toes on the right foot which had become progressively worse. When he observed Mr. Levin, he noted that the gangrene of the right foot, especially the toes, had also involved the right leg. He also noted that Levin's left leg was becoming gangrenous. Immediate hospitalization was ordered by the physician.

Mr. Levin was transferred to Graduate Hospital on January 7, 1976. On his admission, "a very obvious gangrene of both feet was noted. The right foot was completely gangrened, and there was drainage." A below-knee amputation of the right foot was immediately ordered and performed. The patient tolerated the operation well, but died on January 29, 1976. Mr. Levin, too, had been dehydrated and emaciated on admission to the hospital.

In order to determine whether the Landsbury and Levin cases were isolated instances of poor care and neglect, this Grand Jury subpoenaed the records of Town Court patients who required hospitalization at Graduate Hospital during a two-year period. During this period forty-four patients were hospitalized. Kathleen Davies, R.N., a staff ombudsman for the Nursing Home Ombudsman Project, Governor's Office of Human Resources, was asked by this Grand Jury to review the case files. She was requested to select those cases, if any, which, based on her training and experience, were clearly indicative of sub-standard care, negligence, and/or a conscious disregard for the health and welfare of the patients involved. This

Grand Jury, exhibiting the greatest caution, then submitted these selected cases to a medical expert.

David Hawk, M.D.,[3] reviewed the case files selected by Kathleen Davies, R.N. He testified that of the thirteen case histories which he reviewed, twelve involved serious deficiencies in patient care by Town Court which, in turn, rquired hospitalization for the patient. In ten of the cases, the patients died after hospitalization. While Dr. Hawk was unable to state that substandard care and improper treatment was the primary cause of death because of the extreme age of the patients, he did testify that, in his opinion as an expert, the "deficiencies contributed in one way or another to the patients' hospitalizations and deaths." (N.T. March 9, 1977, page 28.)

In case after case, Dr. Hawke stated, there was clear evidence that the nursing staff at Town Court had had absolutely no medical guidance or direction. Dr. Hawk explained that the medical chart is the "hub of information" and is the means by which the medical staff communicates. When a system breaks down, the chart doesn't reflect the care and problems a patient has. (N.T. March 9, 1977, page 32.) Time after time, the system broke down. For example, Bertha Keyes, age 84, became a resident of Town Court on November 6, 1975. A history and physical was not done until four days later. Lab tests on November 6th and 13th

[3] Dr. Hawk graduated from the University of Pennsylvania Medical School. He is board certified in family practice. He received his Masters Degree in Public Health from Johns Hopkins University. He is, presently, a consultant to the State Health Department's Offiee of Quality Assurance, Division of Long Term Care.

showed abnormal urinalysis. There was no follow-up. In the following two months, the Town Court medical staff not only watched her deteriorate but, unbelievably documented that deterioration: "white blood cells too numerous to count"; "innumerable white blood cells"; "right side of body twitching involuntarily"; "patient looks serious and moaning"; "patient feverish"; "looks as if she had a stroke." Finally, on January 6, 1976, she was transferred to Graduate Hospital. The hospital's diagnosis was severe dehydration and contractures of the arms and legs. Dr. Hawk testified that dehydration and contractures are inconsistent with good nursing home care. (N.T. March 9, 1977, page 42-43.) During the entire period at Town Court she was never examined by a physician. In fact, the physician whom Town Court finally asked to examine Mrs. Keyes, Dr. Anthony Leone, testified that one month prior to the Keyes incident, he notified the Administrator of Town Court that he could no longer treat its patients because of the demands of his practice. Town Court's telephone call for help was to a doctor whom they knew would not respond.

Elaine Smith, age 58, was admitted to Town Court on October 29, 1975. Lab tests in November and December showed abnormal urinalysis. There was no follow-up. She became cyanotic. A physician ordered valium over the phone. He did not see that the patient was cyanotic and ordered valium which is a respiratory depressant. She was hospitalized for respiratory distress.

Mary Dodel, age 69, was admitted to Town Court on February 19, 1976. No physical exam was done until three days later. This meant that no orders were

on her chart. The patient could not be cared for properly. In April, 1976, lab tests showed anemia. There was no follow-up. In June, 1976, lab tests showed abnormal urinalysis. Again there was no follow-up. On August 6, 1976, she was admitted to Graduate Hospital with urinary tract infection, anemia requiring transfusions, contractures[4] and dehydration.

Rose Ludwig, age 75, a diabetic, was admitted to Town Court on June 6, 1976. No history or physical was done. Therefore, there was no medical care plan. She continued to receive insulin while in a state of dehydration.

It is important that a person eat and drink when on insulin. Patients must be watched closely or they will go into shock. Mrs. Ludwig was hospitalized for diabetic shock. She returned to Town Court on August 3, 1976. There is no evidence on the medical chart that she was seen by a doctor until August 21, 1976, the day she died.

Gussie Dinnerman, age 78, was admitted to Graduate Hospital on August 15, 1975, because of severe dehydration. Town Court's medical records do not indicate she was having a problem with fluid intake. An examination at Graduate Hospital showed Mrs. Dinnerman to have a normal fluid intake system. Town Court was giving her two types of diuretics (water pills). This medication caused the patient's dehydration.

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[4] Contractures: A tightening of the muscles due to inactivity. It is prevented by a range of motion exercises, i.e., routine nursing care.

Mary Barrett, age 73, was transferred to Graduate for the same reason as Gussie Dinnerman. She was receiving diuretics to such a degree that the admitting diagnosis was "dehydration secondary to inadequate nursing care."

Dorothy Whitaker, age 74, was admitted to Town Court on September 26, 1975. She had a leg ulcer that a lab report, dated December 22, 1975 indicated was positive for staphylococcus, a highly infectious bacteria. No one at Town Court took cognizance of the lab report. No one at Town Court notified a doctor. Town Court took no precaution to protect its extremely frail population. From Dr. Hawk's testimony it is clear that the only acceptable medical procedure would have been to place this patient in isolation. In addition, Mrs. Whitaker's last 13 days at Town Court produced only a single notation on her medical chart. She died on the same day she was finally transferred to Graduate Hospital. On February 12, 1976, a nurse recorded that Mrs. Whitaker was "gasping for breath". When Dorothy Whitaker arrived at Graduate Hospital on February 13, 1976, the attending physician wrote the following: "Patient comes to us in the usual state of neglect, with fever, hypertension, and no story or report". She died that day.

Mary Gaines, age 70, was admitted to Town Court on September 16, 1975. Town Court records show that the admission history and physical were performed on November 28, 1975. Without medical orders, there can be no patient care plan. On February 10, 1976, she was admitted to Graduate Hospital. The diagnosis on admission was "dehydration due to neglect". She suffered a heart attack and died that day.

Reba Sinders was admitted to Town Court on May 13, 1973. The only physical examination Dr. Hawk found on the chart was dated May 12, 1975.

Ralph Durso, age 81, was admitted to Graduate Hospital with a diagnosis of severe dehydration. The medical records of Town Court indicate that Durso was mistakenly receiving diuretics died at Town Court fifteen days after he was released from the hospital.

Dr. Hawk's testimony covered other cases. In each case, his conclusion was the same: there was gross deviations from the standard of conduct which a reasonable man would expect in a skilled nursing center. Dr. Hawk was able to distinguish five areas of gross deficiencies:

(1) lack of proper medical follow-up procedures where physiological danger signs had been noted;

(2) inappropriate or improper medical treatment;

(3) development of health problems inconsistent with proper nursing care;

(4) inability to reach a physician at the time of an emergency;

(5) improper medical record-keeping.

The above deficiencies, taken singularly or in any combination, contributed to the deterioration of the health of the patient and clearly created substantial risk of harm. According to Dr. Hawk, in a skilled nursing center, the individual responsible to coordinate the medical staff to see that patients get appropriate medical care, is the medical director. (March 9, 1977, pages 33-37).

Dr. Hawk's conclusions are corroborated by the testimony of at least four other physicians.

John Senior, M.D., co-director of Emergency Services at Graduate Hospital, treated three of the above-named Town Court patients. In his opinion, the nursing home's neglect caused the patients' dehydration problems and was a contributing factor to their hospitalization. The term "Town Court Special" appeared with regularity on Graduate Hospital medical records. When asked to define the term, Dr. Senior, who was obviously embarrassed by the "slang term", stated, "it's a way of referring to a sick patient from this particular institution who arrive at our hospital in poor condition". (N.T. March 9, 1976, page 29).

Anthony Dougherty, a resident at Graduate Hospital who treated Mrs. Whitaker, included in his definition of "Town Court Special" patients who arrived in the emergency room without medical records from the nursing home. Accurate and complete medical records are necessary for a diagnosis in an emergency situation. Without them, stated Dr. Dougherty, it is difficult, if not impossible, to treat the patients. (N.T. February 23, 1977, pages 80 and 81).

A physician who was affiliated with Town Court for a year and a half when he testified before this Grand Jury, stated that, at the time of the Landsbury incident and subsequent thereto, the "supervision was not what it should have been, the communication was very poor between nursing staff and the physicians. In other words, we were only aware of a problem if a nurse calls us, and we were not apprised all the time until it was too late, you know, the patient was moribund." (N.T. July 29, 1976, page 16).

Arthur Whereat, M.D., Chief of Staff at the Veteran's Hospital testified that Town Court did not meet the standards of care and treatment required by his agency. In June, 1976, five V.A. patients residing at Town Court were removed from the facility.

On November 22-23, 1976, a medical survey team from the Department of Health inspected Town Court. The report reads, in part,

> Many of the records reviewed lack patient care plans. Nursing care plans did not reflect the actual patient needs or goals. Verbal orders were not counter-signed on a timely basis. Physicians' orders were not being executed promptly or correctly on eight records reviewed. Nurses' notes were not chronological or consistent especially as it relates to patients who become ill or manifest unusual signs or symptoms. Medications were not being administered properly nor charged correctly.

Four months earlier, July 19-23, 1976, the Federal Department of Health, Education and Welfare conducted an inspection. Town Court was notified, at that time, that it did not meet the conditions of participation in the areas of "medical direction" and "skilled nursing services".

As late as March 1, 1977, the State Department notified Town Court that their plan to correct deficiencies was unacceptable.

RECOMMENDATION

The Department of Public Health Regulations place the responsibility for meeting its minimum standards

on the licensee of the facility. (Reg. 305.1). It appears further that the reckless conduct we have described was performed by agents and employees on behalf of the licensee and within the scope of their employment.

We, therefore, recommend the following charges, with appropriate counts, be lodged against the holder of the licensee, Town Court Nursing Home, Inc.:

> Failure to Hire a Medical Director pursuant to Department of Public Welfare Regulation 1328—1329.
>
> Failure to Perform Admission Histories and Physical Examinations to Determine Immediate Needs of Patients Pursuant to Department of Public Welfare Regulation No. 1203.
>
> Failure to Provide Patient Supervision by a Physician Pursuant to Department of Public Welfare Regulation No. 1204.
>
> Failure to Provide a Physician in Cases of Emergency Pursuant to Department of Public Welfare Regulation No. 1205.
>
> Failure to Maintain Proper Medical Records Pursuant to Department of Public Welfare Regulation No. 1207 and No. 1208.
>
> Recklessly Endangering the Lives of Patients Pursuant to 18 C.P.S.A. §2705.

II. SOLICITATION AND ACCEPTANCE OF ADDITIONAL REIMBURSEMENT FOR WELFARE PATIENTS

Geriatric and Medical Centers, Inc., is a publicly held corporation which owns Town Court Nursing

Home, Inc. Daniel Veloric is the President of Geriatric and Medical Centers, Inc. He has held that position for approximately four years. Mr. Veloric testified that it was his responsibility as President of Geriatric and Medical Centers, Inc., to see that "we fulfill all the obligations of the license that we hold for any one of our facilities"[5] and "adhere to the regulations as set forth by the governing bodies or government bodies that regulate nursing homes". (N.T. October 8, 1976, page 29).

One of the regulations with which he, as the President of Geriatric and Medical Centers, Inc., was required to abide by under the Public Welfare Code prevented him from seeking or accepting additional reimbursement for patients admitted to his facilities with eligibility for medical assistance. The statute states unequivocally:

> As a condition of participation in the medical assistance program, vendors of services shall agree to accept the rates of payment authorized by this article and shall not seek nor accept additional payments. . . . 62 P.S. §441.1.

Geriatric and Medical Centers, Inc. and Town Court violated this statute when Daniel Veloric devised a scheme to obtain additional compensation from certain Philadelphia hospitals. Veloric seized upon the fact that hospitals do not get full reimbursement for patients whose only requirement is skilled nursing care. Therefore, he knew the hospitals were under tremendous financial pressure to transfer such patients to a skilled nursing center as quickly as possible to free up a bed for which they could normally charge $150.00 to $200.00 a day.

[5] Geriatrics and Medical Centers, Inc. owns Town Court, Cobbs Creek, Mayo, Cheltenham and Walnut Park Plaza in the City of Philadelphia.

Veloric's proposal to Graduate Hospital is documented in a memorandum prepared by the controller of Graduate Hospital dated March 20, 1975:

> Mr. Veloric indicated that Town Court and Cobbs Creek are presently receiving $750 bimonthly from Graduate for its assistance in the discharge planning for patients to be referred to nursing homes and in relating with the physicians staff at Graduate relative to continuity of care for these patients. More importantly, however, it has assured the availability of beds in these two institutions for Graduate referred patients.
>
> Mr. Veloric indicated that supplemental payments above the $20 was necessary to give him the financial patient mix necessary to cover the cost and to generate the required profit margin. He also must operate a high percentage of occupancy (98-100%) on which guaranteed payment of vacant beds to have them available can help him. He is willing to discuss finances in any way which is acceptable to the involved hospital. His chain of nursing homes include eight facilities with 1,400 beds.

In a written agreement between Geriatric and Medical Centers, Inc. and Presbyterian-University of Pennsylvania Medical Center, Geriatric agreed to reserve five beds for the sole use of the hospital's patients and to "guarantee" admission for its patients. In return,

the hospital agreed to pay "$12,000.00 annually for the admissions guarantee and the designation of the five beds", and "$200.00 monthly for each additional bed". The program proved so successful that both the number of beds and the placement fee were increased.

All patients placed under these agreements received medical assistance approvals prior to placement.

The financial records of both hospitals and Geriatric and Medical Centers, Inc., and Town Court document the payment and receipt of $83,184.00 in placement fees. Graduate paid $34,500.00 from July, 1974 to July, 1975. Presbyterian paid $48,684.00 from November, 1975 to January, 1977. Town Court's share amounted to $38,942.00. The hospitals, in turn, were reimbursed by the State for the monies it paid to Geriatric and Medical Centers, Inc.[6] Unwittingly, the State was subverting its own statutes by subsidizing a plan which not only gave preferential placement to patients, but also insured placement to a sub-standard facility.

Needless to say, Geriatric and Medical Centers, Inc. and its subsidiaries, billed the State for the full amount of their medical assistance on the patients covered by the agreements. At no time did Geriatric and Medical Centers, Inc. give the State credit for the monies it received from Graduate and Presbyterian.

The Grand Jury received testimony from representatives of the Philadelphia County Board of Assistance

[6] The hospitals did not conceal or misrepresent the true nature of the expense. This Grand Jury has learned that since we questioned the propriety of reimbursing these placement fees, these items have been disallowed by the State.

as well as the Office of the Controller for the State Department of Welfare. From their testimony it was clear to us that a fraud had been committed.

They testified that any medicaid payment for skilled nursing care must be made pursuant to a written request for reimbursement from the nursing home. The nursing home is also obligated to notify the State Department of Welfare through the local County Board of Assistance of any additional funds which are being used by the home to defray the cost of nursing care for each patient. Neither Geriatric and Medical Centers, Inc., nor its subsidiaries never notified the County Board of Assistance or the State Department of Welfare of its agreements with Graduate and Presbyterian Hospitals. Had this been done, the amount received from the hospitals would have been deducted by the state in its reimbursement to the nursing home.

Having made our presentment based on our investigation of the financial records of Geriatric and Medical Centers, Inc., we would be remiss if we did not acknowledge the help given this Grand Jury by Al Benedict, Auditor General for the Commonwealth of Pennsylvania.

The District Attorney recognized the need for seasoned auditing experience at the outset of this investigation. The Auditor General was contacted. His staff's contribution to the District Attorney's investigative efforts were immediate and significant. He is to be commended.

RECOMMENDATION

We, therefore, recommend that the District Attorney charge Geriatric and Medical Centers, Inc., Town

Court with Theft by Deception in that they sought and/or received additional payments for patients under the medical assistance program. We recommend that they be charged under the appropriate sections of the Pennsylvania Crimes Code.

The Grand Jury has reviewed the evidence presented to us carefully. We have heard forty witnesses give 45,000 pages of testimony. Volume alone, however, does not account for the full complexity of this matter. The facts which we have uncovered is further obscured by the realities of corporate management. We could not in good conscience lay blame on poorly trained and inadequately supervised employees. At the same time, we recognize that high level management is insulated from the daily operation of the home. Each decision is relayed through the multiple layers of the corporate chain of command. The actual execution of orders is carried out by employees far removed from the decision making process. Individual responsibility is diluted by the sheer number of people employed by Geriatric and Medical Centers, Inc. At this time the focus of individual criminal responsibility is not clear. It is our intention to call additional witnesses. We will determine, if possible, whether individuals can be held criminally responsible for the conditions at Town Court.

Although the patterns of patient abuse uncovered by this Grand Jury are immediately apparent, the actual burden of legal responsibility for criminal acts is not. A publicly held corporation is far different from the family owned nursing home which was the subject of our last presentment. It is for these reasons that we have limited criminal responsibility to Town Court

and Geriatric and Medical Centers, Inc. We foresee that the District Attorney may have some difficulty with these prosecutions. We are certain, however, that criminal prosecution is not the answer to the problem of ensuring that the elderly in our community receive decent care. The District Attorney's Office does not have the power to make Town Court a decent nursing home. There are other agencies which are charged with enforcing health and welfare laws. Those agencies can force Town Court and every other marginally operated nursing facility in this city to provide decent care. It is a fact that nursing homes have become a profit making industry in this country because of state and federal monies that are available. Indeed, it is more profitable to operate a marginal facility.

It is the consensus of this Grand Jury that the Department of Health and Welfare can force facilities like Town Court into complying with each and every health and welfare regulation, by simply cutting off state funds—the source of their profits and appointing a master.

We strongly recommend that the Honorable Charles P. Mirarchi, Jr., take the following action immediately:

1. Request the Departments of Health and Welfare to appoint a "master" to monitor the daily operation of Town Court with the authority to make recommendations to Town Court for immediate implementation. If Town Court fails to comply with the recommendations within a short period of time, the "master" should initiate proceedings to revoke Town Court's license. The

"master" shall make all reports available to the Court.

2. Request the Department of Welfare to cease all payments to Town Court for its medical assistance patients. All payments are to cease until the Court is satisfied that Town Court has met the requirements of the "master".

3. Request the Department of Health to conduct an immediate inspection of the Town Court facility and a physical examination of each of its patients and forward a report to the Court.

The Grand Jury has received the most recent Health Department inspection reports for the facility. They indicate inadequate care and danger to patients.

Cm

Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL ROBAK, JR., CLERK

78-1318

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1318.

HELEN B. O'BANNON, Secretary of Public Welfare,
Petitioner,

v.

TOWN COURT NURSING CENTER, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CONTENTS.

	Page
I. Opinions Below	1
II. Jurisdiction	1
III. Questions Presented	1
IV. Statement of the Case	2
V. Reasons for Denying the Writ	5
A. There Is No Division Among the Circuits	5
B. The Decision of the Lower Court Was Correct	7
C. The Petitioner Cannot Invoke the Jurisdiction of This Court in the Absence of Any Appeal or Cross-Appeal by Petitioner From the Order of the District Court	9
D. Proposed Federal Law Will Prohibit a State Medicaid Program From Adopting Termination Procedures Inconsistent With Federal Law When a Skilled Nursing Facility Participates in Both Medicare and Medicaid Programs	10
E. This Proceeding Is at an Interlocutory and, Hence, Review Would Be Premature	11
Conclusion	11
Exhibit "A"—Unpublished Opinion, Caton Ridge Nursing Home, Inc. v. Califano, No. 78-1290 (4th Cir., filed Feb. 26, 1979)	13
Appendix:	
Opinion and Order of District Court, July 27, 1977	A1
Opinion and Order of District Court, September 15, 1977	A5

TABLE OF CITATIONS.

Cases:	Page
Bracco v. Lackner, No. C-78-0471 (N. D. Cal., April 5, 1978)	7
Caton Ridge Nursing Home, Inc. v. Califano, 447 F. Supp. 1222 (D. Md. 1978), *aff'd* No. 78-1290 (4th Cir., filed Feb. 26, 1979)	5, 6
Cook v. Bates, No. 78 Civ. 3600 (S. D. N. Y., Aug. 22, 1978)	7
Cook v. Bates, No. 78 Civ. 3600 (S. D. N. Y., Oct. 6, 1978)	6
Hamilton-Brown Shoe Co. v. United States, 240 U. S. 251, 60 L. Ed. 629, 36 S. Ct. 269 (1916)	11
Klein v. Califano, 586 F. 2d 250 (3d Cir. 1978)	6, 7
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 67 L. Ed. 712, 43 S. Ct. 422 (1923)	5
Mathews v. Eldridge, 424 U. S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)	8
Memphis Light, Gas & Water Division v. Craft, 436 U. S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978)	8
Moore v. Johnson, 582 F. 2d 1228 (9th Cir. 1978)	5
Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 81 L. Ed. 593, 57 S. Ct. 325 (1937)	10
Penfield Co. v. SEC, 330 U. S. 585, 91 L. Ed. 1117, 67 S. Ct. 916 (1947)	10
Skehan v. Board of Trustees, No. 77-2311/12 (3d Cir., filed Dec. 21, 1978)	11
Town Court Nursing Center, Inc. v. Beal, 586 F. 2d 282 (3d Cir., 1978)	6, 7
Town Court Nursing Center, Inc. v. Beal, 586 F. 2d 266 (3d Cir. 1978)	9

TABLE OF CITATIONS (Continued).

Statutory Provisions:	Page
28 U. S. C.:	
§ 1254	1, 2
42 U. S. C. A.:	
§ 1395 *et seq.*	2
§ 1396 *et seq.*	2
38 U. S. C.:	
§ 620-28	5
§ 610(b)(2)	5
Rules of Court:	
4th Cir. R. 18	6
Administrative Regulations:	
38 C. F. R.	
§ 17.30(n)	5
45 C. F. R.:	
§ 205.10	8
§ 249.12(a)(1)(ii)(B)(4)	8
44 F. R.:	
9749 (Feb. 15, 1979)	11
28 Pa. Code:	
§ 213.1 *et seq.*	2
Constitutional Provisions:	
Fifth Amendment	3
Fourteenth Amendment	3

RESPONDENTS' BRIEF IN OPPOSITION.

Respondents Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt oppose the petition of Helen O'Bannon, Secretary of Public Welfare for the Commonwealth of Pennsylvania, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 29, 1978.

I. OPINIONS BELOW.

The majority and dissenting opinions of the Court of Appeals are reported at 586 F. 2d 280 and are set out in the appendix to the Petition for Writ of Certiorari at 24a, 60a. The District Court's order is set out therein at 23a. An oral opinion issued in connection therewith is set out in the appendix hereto at A5. A prior order and opinion of the District Court is set out in the appendix hereto at A1.

II. JURISDICTION.

Petition seeks to invoke the jurisdiction of this Court pursuant to 28 U. S. C. § 1254. There is no jurisdiction here because petitioner filed no appeal or cross-appeal from the Order of the District Court which Order was affirmed in relevant part by the United States Court of Appeals for the Third Circuit. See V. C. *infra* for further discussion.

III. QUESTIONS PRESENTED.

The petition presents two questions. The first, as referred in II. above, is a result of the failure of Petitioner's predecessor as Secretary of Public Welfare to appeal or cross-appeal from the Order of the District Court granting respondents' relief. The Court of Appeals received a brief

and heard argument from Petitioner's predecessor only as an appellee. The Court of Appeals affirmed the Order of this District Court in relevant part. Thus, the following question is presented:

> Whether this Court has jurisdiction pursuant to 28 U. S. C. § 1254 with respect to review sought by a party who, as an appellee only prevailed in the court below.

The second question presented is whether or not patients in a skilled nursing facility who, according to the opinion of the District Court and the uncontradicted testimony heard therein, would suffer substantial adverse physical and psychological effects in any transfer to another facility (hereinafter referred to as "transfer trauma"), have a constitutionally protected property interest both in the certification of that facility under Title XVIII and XIX of the Social Security Act, 42 U. S. C. A. § 1395 *et seq.* and § 1396 *et seq.*, respectively, and remaining in that facility until they are provided some form of hearing.

IV. STATEMENT OF THE CASE.

In May, 1977, Town Court Nursing Center, Inc. ("Town Court"), a one hundred ninety-eight bed skilled nursing facility,[1] received notice from the Secretary of Health, Education and Welfare that as of June 18, 1977, with an additional thirty (30) day period for patient transfer, it was decertified as a Medicare provider. Subsequently, based entirely upon this federal action, Petitioner, through a predecessor, notified Town Court that its participation in the Pennsylvania Medicaid program would

1. Under Pennsylvania law, skilled nursing facilites provide 24-hour nursing care and related services under the general direction of a licensed physician. 28 Pa. Code § 213.1 *et seq.* Lesser degrees of medical services are provided by intermediate care facilities and domicilliary care facilities, respectively.

terminate on the same date. Town Court filed administrative appeals both on state and Federal levels which appeals are presently pending.

On July 20, 1977 Respondents filed a Complaint in the Eastern District of Pennsylvania seeking to enjoin Respondent from removing them from Town Court and contending that Town Court's decertification unconstitutionally violated their right to the procedural safeguards of the Fifth and Fourteenth Amendments. The District Court granted a temporary restraining order and, after a hearing, a preliminary injunction accompanied by an oral opinion (A1). Respondents later applied for an extension of the preliminary injunction and a further hearing was held. Again the District Court issued an oral opinion and an order (A5), thereafter entered in written form, granting in part and denying in part Respondents' requested relief.[2]

Respondents appealed from the denial of relief, and obtained an injunction pending appeal from the lower court with respect to that relief. The Secretary of Health, Education and Welfare cross-appealed. Petitioner neither appealed nor cross-appealed from the Order of the District Court. The Court of Appeals vacated the judgment and remanded the cause to the District Court for further proceedings consistent with the relief sought by Respondents. The Court of Appeals also affirmed that portion of the Order which was subject to the cross-appeal.

Petitioner, through her immediate predecessor, then sought enlargement of time within which to file petition for certiorari, stating, *inter alia*, "[t]he decision of the Solicitor General with respect to whether or not to petition for certiorari has a direct bearing on whether the Secretary will petition for certiorari." [Second] Application for En-

2. In the District Court, Petitioner filed a motion to dismiss which motion was opposed by Respondents. No decision has been rendered on that motion.

largement of Time Within Which To File Petition for Writ of Certiorari, at 2. Although identical relief was granted by the Court of Appeals against the Secretary of Health, Education and Welfare, no petition for certiorari has been filed by the Solicitor General on behalf of the Secretary.

V. REASONS FOR DENYING THE WRIT.

A. There Is No Division Among the Circuits.

This is no "real and embarrassing conflict of opinion and authority" between the courts of appeal. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393, 67 L. ed. 712, 714, 43 S. Ct. 422 (1923).

Petitioner first contends that the decision of the Third Circuit in this case is in direct conflict with the decision of the Ninth Circuit in *Moore v. Johnson*, 582 F. 2d 1228 (9th Cir. 1978).

Moore involved a claim by recipients of Veterans Administration benefits under 38 U. S. C. §§ 620-628 that their transfer to another facility violated their constitutional rights. The benefits involved were domicilliary care and vocational training provided to veterans in need of, but unable to afford domicilliary care, incapable of earning a living and having no adequate means of support. 38 U. S. C. § 610(b)(2). According to Veterans Administration regulations, domicilliary care is "the furnishing of a home to a veteran, embracing the furnishing of shelter, food, clothing, and other comfort of home, including such incidental medical care as is necessary to maintain him." 38 CFR § 17.30(n). Thus, recipients of Veterans Administration domicilliary care need not be in need of medical care at all and, indeed, in *Moore* there was no allegation that plaintiffs were in need of, or were receiving, medical care of any kind.

In sum, none of the issues which arose in *Moore* also appear in this case either by way of conflicting precedent or conflicting principles of law.

Petitioner also cites *Caton Ridge Nursing Home, Inc. v. Califano*, 447 F. Supp. 1222 (D. Md. 1978), *aff'd* No. 78-1290 (4th Cir., filed Feb. 26, 1979) (per curiam). In

its unpublished opinion (attached as Exhibit "A" hereto), the United States Court of Appeals for the Fourth Circuit stated:

> [W]e note that Klein v. Califano, 586 F. 2d 250 (3d Cir. 1978), which was decided after the district court's decision, does not suggest a different result. In *Klein*, the Third Circuit held that nursing home residents were entitled to a hearing prior to decertification of the facility as a qualified Medicaid provider and transfer of its patients. The Third Circuit, however, specifically distinguished its holding from that of the district court in *Caton Ridge*. *See* 586 F. 2d at 260 n. 17. The alleged violations of the nursing home in *Klein* involved deficient services rendered to the patients. Thus, the residents could be expected to contribute relevant information in the context of a pre-transfer hearing. In contrast, Caton Ridge was decertified because of its failure to correct structural and other defects which constituted a fire hazard. As the district court noted in its opinion, there is no reason to believe that patient input could shed any light on Caton Ridge's non-compliance with the life safety code. 447 Supp. at 1226.

The rules of the Court of Appeals for the Fourth Circuit provide that an opinion will be published in the event, *inter alia*, it "creates a conflict with a decision in another circuit; . . ." 4th Cir. R. 18. Thus, that court, in determining not to publish its opinion in *Caton Ridge*, concluded that no conflict existed with *Klein* and *Town Court*. Further, the decision itself impliedly agrees with the decisions in both *Klein* and *Town Court*.

Finally, petitioner cites a third decision, *Cook v. Bates*, No. 78 Civ. 3600 (S. D. N. Y., Oct. 6, 1978) (Carter, D.J.), reported in CCH Medicare and Medicaid Guide ¶ 29,410. *Cook* involved termination of state funding for psychiatric counseling at a methadone maintenance center. The court distinguished its holding from that of *Bracco v. Lackner*, No. C-78-0471 (N. D. Cal., April 5, 1978), in which the transfer of patients from a decertified skilled nursing facility was enjoined until a pretermination hearing was held because of the transfer trauma suffered by patients upon transfer. See also *Cook v. Bates*, No. 78 Civ. 3600 (S. D. N. Y., Aug. 22, 1978) (Sweet, D.J.) (decision on earlier motion for preliminary injunction distinguishing *Bracco* on same grounds).

Therefore, no division among the Circuits exists on the question raised by Petitioner.

B. The Decision of the Lower Court Was Correct.

The lower court held that the patients of a skilled nursing facility had a constitutionally cognizable property interest in the status of the facility as a certified provider under the Medicare and Medicaid programs.

The lower court cited as controlling the holding of *Klein v. Califano*, 586 F. 2d 250 (3d Cir. 1978), which was decided the same day as *Town Court*. In *Klein*, the lower court held that "[t]he statutory provision permitting a recipient to obtain medical care from a freely selected provider and the regulations prescribing limited conditions for transferring a resident of a nursing home create a legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer." *Id.* at 258. The court did not address an alternative argument, also presented in *Town Court*, that the transfer trauma suffered by dislocated nursing home residents reduces the financial benefits provided to them by the Medicare and Medicaid programs. *Id.* at 259-60 n. 16.

Thus, there are two independent bases for finding the property interests upon which the holding of the lower court rests.

Petitioner's response is that the programs are limited to qualified providers and that the decision to decertify a particular provider does not affect a recipient's eligibility for services.

This argument puts the cart before the horse. Where, as in this case, the uncontradicted evidence is that these patients would suffer mental and physical harm if they were transferred to another facility, the question is whether or not the facility is qualified to render the care necessary to sustain their physical and mental well-being considering the harm such a transfer would cause them. *Memphis Light, Gas & Water Division v. Craft*, 436 U. S. 1, 56 L. Ed. 2d 30, 42 n. 15 98 S. Ct. 1554, 1563 n. 15 (1978) (where uninterrupted continuity of service is essential to health and safety, consumers should be given an opportunity to present their reasons for opposing termination prior to cessation of service).

Further, Respondents' claim under 45 C. F. R. § 205.10 must also be recognized. That claim was not directly discussed by the lower court. The cited regulation provides that timely notice and an opportunity for a pretermination hearing must be given to any recipient "who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance." See *Mathews v. Eldridge*, 424 U. S. 319, 326 n. 5, 47 L. Ed. 2d 18, 28 n. 5, 96 S. Ct. 893, 898 n. 5 (1976). Other regulations provide that a patient may be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay." 45 C. F. R. § 249.12(a)(1)(ii)(B)(4) (1976).

No opportunity for a pretermination hearing was provided here. Had such a hearing been held, a determination of the sufficiency of the reasons for transfer would have occurred. By failing to provide such a hearing, Petitioner violated both the constitutional and administrative rights of patients at Town Court.

C. The Petitioner Cannot Invoke the Jurisdiction of This Court in the Absence of Any Appeal or Cross-Appeal by Petitioner From the Order of the District Court.

In the compainion case, *Town Court Nursing Center, Inc. v. Beal*, 586 F. 2d 266 (3d Cir. 1978), the lower court discussed the failure of Petitioner to appeal or cross-appeal from an identical order entered with respect to Town Court itself:

> In this court, however, Secretary Beal [one of Petitioner's predecessors] expressly had declined to take a position on the legal issues raised on appeal. Nor has he cross-appealed from that portion of the district court's judgment that enjoined him from discontinuing payments to Town Court for care rendered Medicaid patients.
>
> * * *
>
> Secretary Beal has chosen not to cross-appeal, unlike Secretary Califano. He apparently so acted in the belief that, since he was required to terminate Town Court's Medicaid agreement upon Secretary Califano's termination of Town Court's Medicare provider status, he is under no independent obligation to provide funding should Secretary Califano not also be obligated to provide reimbursement.
>
> We believe Secretary Beal misconceives his position in this litigation. Town Court sued him independently. It alleged a cause of action against him that was not derivative of the cause of action against

> Secretary Califano, but was based on alleged independent violations of Town Court's constitutional rights to due process. In these circumstances, the judgment of the district court must be seen as binding Secretary Beal to continue Medicaid payments regardless of Secretary Califano's obligation to continue reimbursement.
>
> Since Secretary Beal has not cross-appealed, the propriety of the order that the district court entered against him is not before us. This appeal, however, is from a preliminary proceeding in the district court. Upon remand, therefore, Secretary Beal will be free to seek a modification of the district court's order to conform to the judgment of this court with respect to Town Court's rights.

Id. at 278-79.

In so holding, the lower court followed the law regarding the necessity of filing an appeal or cross-appeal. That law is equally applicable to bar review presently sought by Petitioner from the lower court's order. *E.g., Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191-92, 81 L. Ed. 593, 598, 57 S. Ct. 325 (1937); *Penfield Co. v. SEC*, 330 U. S. 585, 594, 91 L. Ed. 1117, 1125, 67 S. Ct. 916 (1947).

D. Proposed Federal Law Will Prohibit a State Medicaid Program From Adopting Termination Procedures Inconsistent With Federal Law When a Skilled Nursing Facility Participates in Both Medicare and Medicaid Programs.

Proposed Federal regulations will, if adopted, require a state to follow Federal procedures in decertifying a skilled nursing facility when that facility is certified under both Medicaid and Medicare programs. 44 F. R. 9749 (Feb. 15, 1979) (regulation to become effective May 16, 1979). Thus, where Federal procedure requires a pretermination hearing under Medicare, as required in *Town Court*, the state will be required to provide a pretermination hearing under Medicaid. If the regulation becomes effective, any decision in this case favorable to the State would not affect decertification efforts affecting patients in other facilities certified for both Medicare and Medicaid.

E. This Proceeding Is at an Interlocutory State and, Hence, Review Would Be Premature.

This case has been remanded for further proceedings. There are pending preliminary objections which must be decided and a determination of the process due Respondents must also be made. Therefore, review at this interlocutory stage of the litigation would be inappropriate. *Hamilton-Brown Shoe Co. v. United States*, 240 U. S. 251, 258, 60 L. Ed. 629, 633-34, 36 S. Ct. 269 (1916).

Petitioner cites *Skehan v. Board of Trustees*, Nos. 77-2311/12, slip op. at 22 (3d Cir., filed Dec. 21, 1978), to establish the finality of such rulings. Petition for Writ of Certiorari at 14 n. 20. However, in *Skehan*, certain defendants had succeeded in obtaining dismissal of the litigation. Review was obtained from these final judgments. This case, in contrast, is interlocutory in nature as to all defendants.

CONCLUSION.

For the foregoing reasons, Respondents respectfully request that the petition for writ of ceritorari be denied.

Respectfully submitted,

WILLIAM F. COYLE,
Attorney for Respondents.

EXHIBIT "A".

[Unpublished]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1290

Caton Ridge Nursing Home, Inc.
and Ethel Grabill,

Appellants,

v.

Joseph A. Califano, Jr., Sec. of Health, Education & Welfare and Maryland State Department of Health and Mental Hygiene and Neil Soloman, Secretary, Maryland State Department of Health and Mental Hygiene,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Joseph H. Young, District Judge.

Argued February 5, 1979 Decided February 26, 1979

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges.

Robert J. Thieblot for appellants; Diane C. Moskal, Assistant Regional Attorney, Office of the General Counsel, Department of HEW; Randall Lutz, Assistant Attorney General (Francis Bill Burch, Attorney General; Louise T. Keelty, Assistant Attorney General on brief) for appellees.

PER CURIAM:

Plaintiffs Caton Ridge Nursing Home, Inc., and Ethel Grabill, a former patient at the home, brought this action against state and federal officials challenging the procedures used to terminate Caton Ridge from participation as a provider in the Medicaid program, and to effect the transfer of Grabill and other Medicaid patients to other nursing care facilities. The district court found that neither the nursing home nor the patient was denied due process of law. We affirm the entry of summary judgment in favor of the defendants for reasons adequately stated by the district court. Caton Ridge Nursing Home, Inc. v. Califano, 447 F. Supp. 1222 (D. Md. 1978).

Additionally, we note that Klein v. Cailfano, 586 F. 2d 250 (3d Cir. 1978), which was decided after the district court's decision, does not suggest a different result. In *Klein*, the Third Circuit held that nursing home residents were entitled to a hearing prior to decertification of the facility as a qualified Medicaid provider and transfer of its patients. The Third Circuit, however, specifically distinguished its holding from that of the district court in *Caton Ridge*. *See* 586 F. 2d at 260 n. 17. The alleged violations of the nursing home in *Klein* involved deficient services rendered to the patients. Thus, the residents could be expected to contribute relevant information in the context of a pre-transfer hearing. In contrast, Caton Ridge was decertified because of its failure to correct

structural and other defects which constituted a fire hazard. As the district court noted in its opinion, there is no reason to believe that patient input could shed any light on Caton Ridge's non-compliance with the life safety code. 447 F. Supp. at 1226.

Accordingly, the judgment of the district court is affirmed.

APPENDIX.

[99]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 77-2474

TOWN COURT NURSING CENTER, INC., et al.

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania

and

JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

Philadelphia, Pennsylvania
July 27, 1977

Before HON. JOHN P. FULLAM, *J.*

PRELIMINARY HEARING

APPEARANCES:

FOX, ROTHSCHILD, O'BRIEN & FRANKEL
by NATHAN L. POSNER, ESQ.,
JEFFREY B. ALBERT, ESQ.,
for Plaintiff Town Court Nursing Center, Inc.

[100]

SAUL LEVIT, ESQ.,
for Additional Plaintiffs

FAITH M. ANGELL, ESQ.,
Deputy Attorney General,
for Secretary of Public Welfare—
Commonwealth of Pennsylvania

MARGARET HATHAWAY, ESQ.,
Assistant Attorney General,
for Secretary of the United States—
Department of Health, Education and Welfare,
Defendant

JENNIFER A. STILLER, ESQ.,
Assistant Attorney General,
for Department of Health—
Commonwealth of Pennsylvania

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[101]

(Commenced at 10:10 o'clock a.m.)

The Court: Anything further in the Town Court matter?

Mr. Levit: Good morning. I am Saul Levit. I am here for William Coyle. He teaches some mornings.

The Court: I hope he teaches students as well as some mornings.

Anything from the defense?

Ms. Angell: Excuse me, Your Honor, I think counsel would like an opportunity to see you in chambers.

The Court: All right.

(Conference in chambers at 10:11 o'clock a.m.)

(Discussion off the record.)

(The following on the record at 10:50 o'clock a.m.)

The Court: I will note for the record that all of the exhibits which were referred to by the witnesses and identified yesterday have been received in evidence and will be deemed part of the record.

(Plaintiffs' Exhibits 1 through 11 and Defendants' Exhibits 1 through 6 received in evidence.)

The Court: I will note further that I have at counsel's request met with them in chambers and they in turn have met with each other, and it is my understanding that the Order which is about to be entered, while not consented to by any of the defendants, probably is not terribly inconsistent with their views as to an appropriate disposition.

[102]

Specifically on the basis of the evidence which has been presented, it is my feeling that the harm which would be done to the patients as well as to the corporate plaintiff by the cessation of funding would be devastating and irreparable whereas there can be serious question as to the jurisdiction of this Court with respect to the merits of the controversy. I believe this Court does have jurisdiction for the limited purpose of maintaining the status quo during the period when the administrative action on the application for reconsideration is undergoing its routine processing and completion.

Since it is clear on the record that the continuation of patients in that nursing home during that period would not be inconsistent with the continued health and welfare of the patients—in other words, none of the alleged complaints bear on any serious safety or health hazards—

under all these circumstances the following Order is entered:

That the Temporary Restraining Order heretofore entered shall remain in effect pending completion of administrative action on the pending application for reconsideration and until the defendants give to the plaintiffs at least five days' written notice of their intention again to terminate funding.

It is understood that during this period the funding will not be curtailed or cut off and that the defendants will not systematically or otherwise intentionally remove patients from the home except in cases where that is the patient's own voluntary

[103]

choice or in cases of medical necessity. In short, there will be attempt to simply transfer patients for the sake of putting them in some other place rather than this.

And it is understood that there will be no prohibition during this interim period against placement of additional patients at the home.

I believe that covers it, does it not?

Mr. Posner: It is satisfactory to me, sir.

The Court: O.K. Good luck with the administrative review. I hope it proceeds expeditiously.

Thank you all.

(Concluded at 10:56 o'clock a.m.)

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[106]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2473

TOWN COURT NURSING CENTER, INC., et al.

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania

and

JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

---

Philadelphia, Pennsylvania
September 15, 1977

Before HON. JOHN P. FULLAM, *J.*

APPEARANCES:

FOX, ROTHSCHILD, O'BRIEN AND FRANKEL
by NATHAN L. POSNER, ESQ.,
JEFFREY B. ALBERT, ESQ.,
for Plaintiff Town Court Nursing Center, Inc.

[107]

ABRAHAMS & LOWENSTEIN
by WILLIAM F. COYLE, ESQ.,
for Additional Plaintiffs

MARGARET HATHAWAY, ESQ.,
Assistant Attorney General
for Secretary of the United States, Department of Health, Education and Welfare, Defendant

ROBERT S. FORSTER, JR., ESQ.,
Assistant United States Attorney,
for the Government

MARIA PARISH VICKERS, ESQ.,
Assistant Attorney General,
for the Commonwealth of Pennsylvania

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[144]

FULLAM, *J.*:

I may state that the primary purpose of the Court in this proceeding is apparently not capable of being realized.

Let me comment upon the evidence which has been presented both at the previous hearing and today. I am absolutely convinced that nobody in the administrative end of HEW who is involved in this case so far as a party here has the faintest idea of what they are doing.

I am persuaded that somebody got all upset with very

[145]

good justification about complaints of conditions which existed back in 1975, at the latest, or early in 1976, and about financial irregularities. It is absolutely clear to me that anybody in his right mind would conclude that the patients at Town Court Nursing Home are better off there

than they would be anywhere else in the foreseeable future.

I am also satisfied that the evidence which has been presented this morning by the first witness sounded more like a memorized recitation than testimony about facts. It was full of sweeping conclusions and gobeldygook, which makes no sense. The ultimate conclusion was simply the alleged reconsideration of this case was a conclusion that there was adequate documentation or sufficient documentation to substantiate the issue.

It is obvious to me that the taxpayers would have saved a lot of money if instead of all the time that has been wasted in review of documentation and appearance here in this proceeding and somebody has simply gone over and looked the place over. It is quite apparent to me that people are much more interested in sustaining previously stated positions, in dotting I's and crossing T's, than they are in actually carrying out sensibly the very beneficial program having to do with nursing homes.

Having said all that, I nevertheless reluctantly conclude that in view of the position taken by the Government, a

[146]

position which I frankly do not understand and never will, there is nothing that the Court can do about it.

If the administrative bureaucrats persist in being blind to facts, if they persist in looking at documents instead of institutions, if they persist in looking at regulations instead of facts and events, there is nothing the Court can do about it.

It is obvious to me that the outcome of the administrative review is a foregone conclusion. But it is equally obvious to me this is a matter in the control within the administrative agency and not within the control of the Court.

Therefore, it seems to me the long and short of it is that the bureaucrats will wind up with having to stew in their own juice.

I have attempted to make it possible for them to review this matter and arrive at a solution which will be beneficial to the patients involved. That has not borne fruit. It will be up to them to cope with the needs of these patients in some fashion, which I hope will bring them to a realization of the problem.

The Motion for Continuance of the Preliminary Injunction is denied except as follows:

The defendants are restrained from disapproving Medicare and Medicaid payments to those patients who are in the Home now and otherwise entitled thereto, so long as they remain patients in the home.

[147]

The effect of this will be that the plaintiff, Town Court Nursing Home, is not to be required to maintain patients without their being entitled to Medicare payments for those patients who are there.

If the powers that be in the bureaucracy wish to move the patients out, that is their privilege. They are going to pay for them while they are there, and it will be up to them to arrange alternative locations for them.

All of this is denied and the preliminary injunction, of course, is without prejudice to a reconsideration of the matter by the appropriate officials if there can be anyone prevailed upon to have enough enlightenment to look at the current situation and make a current judgment and not look at papers and make a bureaucratic judgment based upon what is on paper and what may have existed in the past.

This hearing is concluded.

(Concluded at 11:22 a.m.).

Supreme Court, U. S.
FILED
APR 12 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

January Term, 1979
No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare,
Petitioner

v.

TOWN COURT NURSING CENTER et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. PETITIONER HAS PROPERLY INVOKED THIS COURT'S JURISDICTION

Respondents argue that Petitioner may not properly invoke this Court's jurisdiction because Petitioner never appealed or cross-appealed from the District Court order. Brief in Opposition at 10. This argument apparently confuses the Court of Appeals' decision in this case with the decision in its companion, *Town Court v. Beal,* 586 F.2d 266 (3rd Cir. 1978) *("Town Court I")*, and completely misperceives Petitioner's status in this case.

In *Town Court I,* Secretary Califano chose to appeal from that portion of the District Court's ruling that required him to pay for all services provided by Town Court prior to the District Court's order dissolving the injunction. *Town Court, supra* at 279. Petitioner, on the other hand, chose not to appeal from that aspect of the order, was not a participant in that appeal, and does not seek to have that ruling reviewed here.

Respondents, however, did take a separate appeal from the District Court's refusal to grant the injunctive relief which they sought against Petitioner. Thus, the Petitioner was appellee in that proceeding. *Town Court v. Beal,* 586 F.2d 280 (3rd Cir. 1978) *("Town Court II")*. In *Town Court II* the Court of Appeals vacated the District Court's ruling and held that the patients had

a due process right to notice and hearing before the facility could be terminated as a provider of skilled nursing home services under Medicare or Medicaid. *Town Court v. Beal,* 586 F.2d 280, 283 (29a). In Petitioner's view that important ruling is erroneous and, as appellee below, it is entirely proper for the Petitioner to seek review of that ruling in this Court.

II. PROPOSED FEDERAL REGULATIONS WILL HAVE NO IMPACT ON THIS CONTROVERSY

Respondents contend that recently proposed rulemaking by H.E.W., if adopted, would greatly alter the framework of this dispute. Respondents have, however, misconstrued these proposed rules which, in fact, will have no bearing whatsoever on the patients' due process rights in the termination process.

The lower court held that skilled nursing home patients were entitled to some form of notice and hearing, and that these procedures must be afforded prior to the termination of that nursing home's Medicare or Medicaid provider status. The proposed rules require no such procedures, pre- or post-termination. In fact, the regulations only require that, upon request, the provider *and not the patients,* be provided with an evidentiary hearing within 120 days *after* the termination or an informal reconsideration procedure prior to the termination. 44 Fed. Reg. 9753 (1979) (to be codified in 42 C.F.R. 431(D)). In short these proposed rules completely ignore the lower court's ruling in this case and correctly recognize that the

patients do not have a valid role in the process of terminating a Medicaid provider. Thus, viewed in the proper light this proposed action by the federal government underscores the need for review of the lower court's decision in this case.

CONCLUSION

Based upon the foregoing, as well as the Petition for Writ of Certiorari, it is respectfully urged that the Petition be granted and this case set for oral argument.

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Supreme Court, U. S.
FILED
JUN 29 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

January Term, 1979
No. 78-1318

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE,
Petitioner

vs.

TOWN COURT NURSING CENTER, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	PAGE
I. Table of Authorities	ii
II. Opinions Below	1
III. Jurisdiction	1
IV. Question Presented	2
V. Statutes Involved	2
VI. Statement of the Case:	
A. Statutory Scheme	3
B. History of These Proceedings	5
VII. Summary of Argument	10
VIII. Argument:	
The Medicaid program does not entitle recipients residing in a nursing home to notice and an opportunity for a hearing in connection with a state's termination of that nursing home from the medicaid program	12
IX. Conclusion	24
Appendix—Statutes Involved	25

I. TABLE OF AUTHORITIES

CASES:

Beal v. Doe, 432 U.S. 438 (1977) 17

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 12, 17, 19

Caton Ridge Nursing Home, Inc. v. Califano, 447 F. Supp. 1222 (D. Md. 1978) 11, 19, 21

Goldberg v. Kelly, 397 U.S. 254 (1970) 14, 22

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 47 U.S.L.W. 4581 (May 29, 1979) 15, 19

Klein v. Califano, 586 F.2d 250 (3d Cir. 1978) 13, 14, 21, 22

Mathews v. Eldridge, 424 U.S. 319 (1976) 17

Meachum v. Fano, 427 U.S. 215 (1975) 19, 22

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) 13, 22

Moore v. Johnson, 582 F.2d 1228 (9th Cir. 1978) 11, 20, 21

Perry v. Sinderman, 408 U.S. 593 (1972) 12, 22

Southeastern Community College v. Davis, 47 U.S.L.W. 4689, 4691 (June 11, 1979) 17

Town Court v. Beal, 586 F.2d 266 (3d Cir. 1978) 8, 9

Town Court v. Beal, 586 F.2d 278 (3d Cir. 1978) 8, 9, 10, 16, 17, 18, 19

CONSTITUTIONAL PROVISION:

United States Constitution, Amendment V 7, 12, 20

STATUTORY PROVISIONS:

Social Security Act, Title XVIII:

42 U.S.C. §1395 et seq. (1970) 3

42 U.S.C. §1395aa (a) (Supp. 1970) 4

42 U.S.C. §1395f (a) (1970) 13

42 U.S.C. §1395x (j) (1970) 3, 25

42 U.S.C. §1395x (j) (6), (10) (1970) 3

Social Security Act, Title XIX:

42 U.S.C. §1396 et seq. (1970) 3

42 U.S.C. §1396a (a) (23) (Supp. 1970) ... 13, 14, 15, 29

42 U.S.C. §1396a (a) (28) (Supp. 1970) .. 3, 13, 25

Pa. Stat. Ann. Tit. 62, §1001 et seq 8

REGULATORY PROVISIONS:

42 C.F.R. §405.614 5

42 C.F.R. §405.615 (a) 6

42 C.F.R. §405.1101 et seq. 3

42 C.F.R. §405.1101 4

42 C.F.R. §405.1121 (k) (4) 15, 16, 29

42 C.F.R. §405.1122 6

42 C.F.R. §405.1123 ..... 4, 6

42 C.F.R. §405.1124 6

42 C.F.R. §405.1125 4

42 C.F.R. §405.1126 4

42 C.F.R. §405.1501 et seq. 5

42 C.F.R. §405.1902 (b) 4

42 C.F.R. §442.15 (a) 4

42 C.F.R. §442.16 4

42 C.F.R. §442.200 3

44 Fed. Reg. 9753 (1979) 5, 16, 18

44 Fed. Reg. 17932 (1979) 14, 16, 18

1 Pa. Code §35.28 5

28 Pa. Code §201.1 et seq. 8

II. OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 586 F.2d 280 and are set out in the appendix at 144a, 181a.

III. JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1978. The Petition for Certiorari was filed on February 26, 1979 and granted on April 16, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

IV. QUESTION PRESENTED

Whether the Medicaid program entitles recipients residing in a nursing home to notice and an opportunity for a hearing in connection with a state's termination of that nursing home from its Medicaid program?

V. STATUTES INVOLVED

Each of the following is set out in an appendix to this brief at pp. 22-27:

42 U.S.C. §1396a (a) (28) (Supp. 1970)
42 U.S.C. §1395x (j) (1970)
42 U.S.C. §1396a (a) (23) (Supp. 1970)
42 C.F.R. §405.1121 (k) (4).

VI. STATEMENT OF THE CASE

A. Statutory Scheme

Skilled nursing home care is one of a host of health care services which may be publicly funded under both Title XVIII (Medicare)[1] and Title XIX (Medicaid)[2] of the Social Security Act. The conditions which a nursing home must satisfy in order to participate in either program are set forth in Title XVIII, 42 U.S.C. §1395x (j) (1970). Title XIX simply requires that before a facility may qualify as a Medicaid provider it must satisfy all of the requirements under Title XVIII, 42 U.S.C. §1396a (a) (28) (Supp. 1970).

These conditions of participation are found both in the Act, 42 U.S.C. §1395x (j) (1970), and in federal regulations, 42 C.F.R. §405.1101 *et seq.*, 42 C.F.R. §442.200. Generally, Congress has established the broad requirements for such nursing homes. For example, the Act establishes minimum requirements for professional staffing and fiscal accountability. *See* 42 U.S.C. §1395x (j) (6), (10) (1970). The more specific conditions, on the other hand, have been provided by regulations of the Department of Health, Education and Welfare (H.E.W.). *See* 42 C.F.R. §405.1101 *et seq.*, 42 C.F.R. 442.200. Thus, H.E.W. has promulgated a complete set of criteria relating to such areas as the minimum educational requirements for professional staff, physician services, di-

[1] 42 U.S.C. §1395 *et seq.* (1970).
[2] 42 U.S.C. §1396 *et seq.* (1970).

etetic services, and specialized rehabilitative services. 42 C.F.R. §§405.1101, 405.1123, 405.1125, 405.1126.

The primary responsibility for surveying nursing homes to determine their compliance with these conditions has been delegated to the states. 42 U.S.C. §1395aa(a) (Supp. 1970). In Pennsylvania, these surveys are performed by the Pennsylvania Department of Health. A team of inspectors is sent to each facility to determine whether it meets all of the conditions of participation[3]. The management of the home is notified of any deficiencies and, if its plan for correcting them is acceptable, it is recommended that the facility be certified as a qualified provider.[4] If the Secretary of H.E.W. or the State Medical Administrator accepts this recommendation, a provider agreement is entered into with the facility.[5]

Annually, each facility is resurveyed to assess its continued eligibility to participate. If the state determines that a particular home is irredeemably out of compliance with these conditions, it must then recommend that the facility's certification as a Medicare provider either not

[3] The actual procedure involves inspection of the plant as well as interviews with staff and residents to determine compliance with all health and safety requirements. See note 20 *infra*.

[4] If the particular nursing home is only seeking Medicaid certification, then this recommendation goes to the state agency responsible for the administration of that state's medical assistance program. If, as in this case, the facility is also seeking Medicare certification, then the survey team's recommendation is made directly to H.E.W.

[5] These agreements may not exceed 12 months in duration. 42 C.F.R. §405.1902(b), 42 C.F.R. 442.15(a). An extension of a Medicaid provider agreement is permitted for a maximum of two months under certain conditions. 42 C.F.R. §442.16.

be renewed or be terminated. If the Secretary of H.E.W. agrees, the facility is notified by the state Medicaid and Federal Medicare administrators of its termination under both programs. 42 C.F.R. §405.614. The provider is then entitled to a series of post-termination review proceedings. 42 C.F.R. §405.1501 *et seq.*, 44 Fed. Reg. 9753 (1979) (to be codified in 42 C.F.R. 431.151 *et seq.*). On the other hand, the residents of that nursing home who are receiving services under Medicare or Medicaid are not themselves provided any hearing, either pre- or post-termination.[6]

B. History of These Proceedings

Originally certified in 1967 as both a Medicare and Medicaid provider, the Town Court Nursing Center (hereafter "Town Court") has had a history of non-compliance with the conditions of participating in these programs (31a-35a, 54a-61a, 271a-278a, 280a, 296a). In 1974, the Pennsylvania survey team concluded that the facility was so substantially out of compliance that it was no longer qualified to participate in either program. Accordingly, the team recommended to H.E.W. that Town Court be terminated as a Medicare provider (36a). After a series of negotiations, extensions, and short term agreements, Town Court was terminated as a provider under Medicare and Medicaid effective October 31, 1974 (33a).

Late in 1974, Town Court applied for readmission to these programs. Surveys of the facility were conducted by the Pennsylvania Department of Health, and in April

[6] However, in Pennsylvania the residents may participate in any review proceedings initiated by the facility. 1 Pa Code §35.28.

of 1976, Pennsylvania recommended that H.E.W. certify the facility as a qualified Medicare provider (33a). Town Court was thereafter recertified as a skilled nursing home under both Medicare and Medicaid. Pennsylvania and Town Court accordingly entered into a provider agreement for provision of nursing home services under Medicaid (33a).

In July of 1976, H.E.W. itself surveyed Town Court (33a). The survey team found serious deficiencies and requested a special survey of the facility by the Pennsylvania officials. Pennsylvania then surveyed the facility in November of 1976, and again in March of 1977. After consultations with Town Court management regarding the deficiencies which had been found and consideration of a plan of correction by Town Court, the Pennsylvania Department of Health recommended that Town Court's provider agreement, which was due to expire on April 30, 1977, not be renewed (34a, 273a, 423a).[7] On the basis of this, H.E.W. concluded that Town Court was no longer qualified to provide nursing home services. Accordingly, H.E.W. notified the facility that it would be terminated under the Medicare program on June 18, 1977. As a result, Petitioner informed the facility that it was not qualified to participate in the Pennsylvania Medicaid program and would be terminated on the same date.[8] (9a, 291a-299a).

[7] The record shows that the deficiencies which were found by both the federal and state survey teams included serious deficiencies in the areas of medical direction (42 C.F.R. §405.1122); physician services (42 C.F.R. §405.1123), and nursing services (42 C.F.R. §405.1124) (33a-34a, 423a-494½a).

[8] Town Court was given these notices on May 17, 1977. Pursuant to federal regulations, it was entitled to, and received, thirty days prior notice of termination. 42 C.F.R. 405.615(a).

Town Court then commenced administrative review proceedings within H.E.W. However, before a decision had been reached on the requested reconsideration, this suit was initiated. On July 20, 1977, Town Court, on its own behalf together with six named residents,[9] sought a restraining order prohibiting the facility's termination under the Medicare and Medicaid programs (15a). In their complaint, plaintiffs charged that the Due Process Clause required that they be given notice and a hearing before the facility was terminated (12a-13a). The defendants were the Pennsylvania Secretary of Public Welfare and the Secretary of H.E.W.

On July 21, 1977, the District Court preliminarily enjoined the defendants from terminating Town Court (22a-23a). The injunction was then extended to allow the completion of H.E.W.'s administrative review process which Town Court had already initiated (288a-289a). However, when the decision to terminate the facility was affirmed by H.E.W., the plaintiffs then applied to the District Court for a further extension of the original injunction (28a). On September 15, 1977, that request was denied and the injunction was dissolved, except that the defendants were ordered to reimburse Town Court for all Medicaid "services actually provided to patients" (117a).

H.E.W. appealed that portion of the District Court's order requiring payments to Town Court beyond June 18, 1977, and Town Court, along with the six residents, appealed from the court's dissolution of the injunction. In

[9] Although brought as a class action on behalf of "patients eligible for Pennsylvania medical assistance benefits at Town Court Nursing Center, Inc." (7a-8a, 11a), the District Court never certified a class (147a).

addition, Town Court and the residents sought an injunction pending appeal prohibiting the termination of Town Court (124a). The Court of Appeals issued that injunction (142a). Accordingly, Town Court continues to receive Medicaid funding from both the federal and state government.[10]

On the merits, the Court of Appeals issued two separate opinions. In the first, Chief Judge Seitz, for the Court, ruled that Town Court on its own behalf had no right to a pre-termination evidentiary hearing.[11] In its second opinion, Judge Aldisert, for the Court, concluded that the residents of Town Court *were* entitled to a hearing before the facility was terminated (149a), *Town Court v. Beal*, 586 F.2d 280, 282-3 (3d Cir. 1978). In addition, the Court affirmed the District Court's order requiring continued funding of Town Court by Pennsylvania and H.E.W.[12]

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[10] As part of its separate obligations under state law, Pennsylvania has continued to monitor the facility and has issued it licenses under state law. Pa. Stat. Ann. Tit. 62, §1001 *et seq.* (Purdon). 28 Pa. Code §201.1 *et seq.*

[11] With respect to this claim, the Court of Appeals correctly concluded that:

> [I]n light of the extensive procedural safeguards already provided to facilities such as Town Court we believe it clear that any interest Town Court might have in continued certification under the Medicare program is adequately protected by existing procedures.

Town Court v. Beal, 586 F.2d 266, 278 (3d Cir. 1978).

[12] This aspect of the Court's order appears to be somewhat inconsistent with its order in the first decision which provides that "[t]he order of the district court continuing in effect part of the preliminary injunction will be reversed as to Town Court". *Compare* Town Court, 586 F.2d at 280 with (150a) Town Court, 586 F.2d at 283, but see Town Court, 586 F.2d at 268.

The Court of Appeals ruling with respect to the Town Court residents is presently under review. The six named residents of Town Court had contended they were independently entitled to a hearing before it was determined that Town Court was not qualified to participate in the Medicaid program. They contended that they would suffer a *de facto* loss of Medicaid benefits with the termination of Town Court as a provider of Medicaid services. The Court of Appeals agreed, concluding that they were entitled to notice and a hearing before the facility was terminated under the program (149a), *Town Court v. Beal*, 586 F.2d. at 282-3. Although the Court of Appeals never prescribed the precise ingredients which would be requiring in such a hearing—leaving that to the District Court on remand—petitioner believes this threshold ruling to be wrong and seeks reversal of it here.[13]

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[13] The Secretary of H.E.W., on the other hand chose not to seek certiorari. Nevertheless, the Solicitor General has informed the Clerk that the Secretary will file a brief in support of Petitioner.

VII. SUMMARY OF ARGUMENT

The residents of Town Court have claimed a "property interest" under Pennsylvania's Medical Assistance Program which, they contend, has been adversely affected by Petitioners' determination that Town Court was not qualified to participate in the program as a provider of nursing home care. Thus, they asserted their entitlement to a hearing before the facility could be terminated as a Medicaid provider.

The lower court agreed, concluding that the disqualification of Town Court was "tantamount to an order to transfer . . ." and therefore, a reduction in their Medicaid benefits. *Town Court v. Beal*, 586 F.2d 280, 282-3 (3d Cir. 1979). Accordingly, the Court of Appeals ordered that before Town Court could be terminated under the program, hearings were required for all of its Medicaid residents. The Court based this ruling on three separate provisions in the Medical Assistance Program: the recipients' statutory right to choose freely among providers; the regulatory limitations on the transfer of nursing home residents; and the requirement of prior notice and hearing before recipients' benefits can be reduced or terminated.

The Court of Appeals approach is wrong because the provisions of the Medicaid program on which it relied are simply inapplicable to the governmental determination of a provider's qualifications to participate in the program. For example, the recipients' statutory right to freely choose among Medicaid providers has not been adversely

affected because that right is explicitly limited to choosing among *qualified* providers. Similarly, the regulatory restrictions on the transfer of nursing home patients do not restrict the Petitioners' statutory responsibility to insure that only qualified nursing homes participate in the program. Thus, the Town Court residents have not had their benefits reduced, for they remain eligible to receive nursing home care from any qualified provider.

Similarly Judge Adams, in his concurring opinion has overlooked certain important considerations which preclude such a loose reading of the statutes and regulations which are involved.

It is, therefore, not surprising that other Courts of Appeals have differed with the lower Court in cases remarkably similar to this one. *Moore v. Johnson*, 582 F. 2d 1228 (9th Cir. 1978); *Caton Ridge Nursing Home v. Califano*, 447 F. Supp. 1222 (D. Md. 1978), *aff'd* Medicare and Medicaid Guide ¶29,631 (Per Curiam). The decision of the lower court represents an unwarranted extension of due process which will invite administrative paralysis in this important program. Accordingly, the decision should be reversed.

VIII. ARGUMENT

The Medicaid Program Does Not Entitle Recipients Residing in a Nursing Home to Notice and an Opportunity for a Hearing in Connection With a State's Termination of That Nursing Home From the Medicaid Program

This case raises the discrete question of whether Medicaid recipients of skilled nursing home services have a property interest under that program which is adversely affected when their particular home is terminated as a qualified provider of Medicaid services. The existence of such an interest in the residents is the necessary predicate to the imposition of the procedural protections of the Due Process Clause. Although traditional notions of real or personal property do not determine what is, and is not, a protectable property interest, more than a mere "unilateral expectancy" of a particular benefit is required. Similarly, while the distinction between "right" and "privilege" in this area has long since been discarded, more than an "abstract need or desire" must be demonstrated before the Due Process Clause will apply. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). Thus a "subjective expectancy" of a governmental benefit standing alone will not support a claim to due process. *Perry v. Sinderman,* 408 U.S. 593, 603 (1972).

The Constitution itself is not the source for any particular property rights. *Board of Regents of State Colleges v. Roth, supra.* Rather, "the underlying substantive

interest is created by 'an independent source such as state law.' " *Memphis Light, Gas and Water Division v. Craft,* 436 U.S. 1 (1978). Accordingly, in this case the Town Court residents must ground their claim to a property interest in the federal and state laws which establish Pennsylvania's Medical Assistance program.

At the outset, it is clear that a recipient of nursing home care under Medicaid is only entitled to receive that care from a provider that is eligible to participate in the program. 42 U.S.C. §1395f(a) (1970); 42 U.S.C. §1396a(a) (28) (Supp. 1970). Indeed, the Court of Appeals has acknowledged this important point. *Klein v. Califano,* 586 F.2d at 258. Moreover, there is certainly nothing in either federal or state law which explicitly grants the residents of a particular nursing home a hearing before that home may be terminated as a Medicaid provider. Nevertheless, the Respondents argue that the Medicaid program, as presently drawn, provides them with an interest in the continued eligibility of a nursing home which both the state and federal governments have found to be unqualified to provide services under the program. The Court of Appeals agreed,[14] concluding that several statutory and regulatory provisions, taken together implicitly created such a property right in the residents.

The lower Court relied upon three provisions of the Medicaid program for its decision. First, the Court noted that Congress has guaranteed eligible recipients the right to freely choose among providers participating in the

[14] In this case, the Court of Appeals merely adopted the reasoning which it articulated in Klein v. Califano, 586 F.2d 250 (3d Cir. 1978) (149a).

program. 42 U.S.C. §1396a(a) (23) (Supp. 1970)[15] Next, the Court focused upon the Medicaid regulations as well as decisions of this Court which require that a Medicaid recipient be afforded a hearing before his benefits are diminished. 44 Fed. Reg. 17932 (1979) (to be codified in 42 C.F.R. §431.200 *et seq.*), *Goldberg v. Kelly*, 397 U.S. 254 (1970).[16] Finally, the Court relied on the federal regulation which prohibits the transfer of nursing home residents by the nursing home operator except under limited circumstances.[17] Taken together, these provisions, in the lower court's view, established that the patients' benefits could be "discontinued only on the occurrence of specified reasons or for cause . . ." *Klein v. Califano*, 586 F.2d at 258. The Court then concluded that the determination that a nursing home was unqualified to participate in the Medicaid program was "tantamount to an order to transfer the patient" which in turn constituted a diminution in his benefits. *Id.*

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[15] This section provides:

> A State plan for medical assistance must—except in the case of Puerto Rico, the Virgin Islands, and Guam, provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services.

[16] In that case, this Court held that a welfare recipient's benefits could not be reduced or terminated without prior notice and hearing. Goldberg v. Kelly, 397 U.S. 254 (1970).

[17] This regulation requires that the nursing home operator not transfer a patient except for:

> . . . medical reasons, or for his welfare or that of other patients, or for non-payment of his stay (except as prohibited by Titles XVIII or XIX of the Social Security Act), and is given reasonable advance notice to ensure orderly transfer or discharge, and such actions are documented in his medical record.

42 C.F.R. §405.1121(k)(4).

In the first instance, this approach fails to recognize that the residents' statutory right to choose freely among providers has not been adversely affected. The statute itself limits their choice to *qualified* providers and that choice remains to them. 42 U.S.C. §1396a(a)(23) (Supp. 1970). Undoubtedly the termination of a provider such as Town Court will indirectly affect its residents but that alone is not sufficient to uphold the reasoning of the lower Court. Indeed the majority's analysis would logically apply in the provision of most governmental benefits. For example, it would seem that before a physician could be excluded as a Medicaid provider his patients would be entitled to a hearing on the matter. Carrying the Court of Appeals' reasoning even further, it would follow that a Medicaid recipient's right to choose providers would also be infringed when the government refuses initially to admit a provider into the program. This clearly was not intended by Congress. "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision making must comply with standards that assure error-free determinations." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 47 U.S.L.W. 4581, 4583 (May 29, 1979).

The Court of Appeals also misperceived the regulations limiting the circumstances under which a Medicaid recipient may be transferred from one facility to

another. 42 C.F.R. §405.1121 (k) (4). This provision does not restrict the Petitioner's authority and duty under the Act to determine whether or not a particular nursing home is qualified to participate in the program. Rather it prohibits operators of participating homes from transferring Medicaid clients without cause. The decision of the Petitioner to terminate Town Court has, therefore, not affected these statutory rights of respondents *vis-a-vis* operators of eligible nursing home providers.

Finally, the fair hearing provisions contained in 44 Fed. Reg. 17932, *supra.* provide no substantive benefits to Medicaid recipients, but merely establish a procedure to adjudicate government attempts to reduce their benefits. Here, however, the residents' entitlements under Title XIX have not been diminished in the least. Their eligibility for medical assistance benefits has simply not been affected by the termination of Town Court. Rather, they remain eligible to receive the same level of nursing home care. However, as always, their eligibility for this care extends only to qualified nursing homes.

Without disputing any of this, Judge Adams[18] nevertheless concluded that reliance on the actual language of each of these statutory and regulatory provisions "tend-[ed] to trivialize the [court's] approach in inferring a basis for the right to due process" (159a), *Town Court v. Beal,* 586 F.2d at 287. To these members of the court, the provisions relied upon implicitly "paint[ed] three distinct points in the landscape of a 'legitimate claim of entitlement' ". *Id.* This admittedly loose construction of the statute and regulations was warranted, in their view,

[18] Judge Adams' concurring opinion is particularly important because four of the six members of the majority joined in it.

because of the increasing role programs such as Medicaid play in society today, 166a, *Town Court v. Beal,* 586 F. 2d at 289, as well as the indirect effect the termination of Town Court would have on its residents, 165a, *Town Court v. Beal,* 586 F.2d at 289. Thus, these "new forms of property", according to Judge Adams, were to be accorded the protection of the Due Process Clause. 166a, *Town Court v. Beal,* 586 F.2d at 289.

This analysis however overlooks certain fundamental considerations. First, courts may not lightly disregard the statutory language used by Congress to create programs such as Medicaid. *Southeastern Community College v. Davis,* 47 U.S.L.W. 4689, 4691 (June 11, 1979), *Beal v. Doe,* 432 U.S. 438 (1977). The manner of distributing public benefits is the province of Congress and the statutory language which is carefully used to accomplish this must be honored by the courts. In this case the Court of Appeals conceded that Congress has not explicitly given Medicaid recipients a role in the approval or disapproval of Medicaid providers in the program, and it was not free to ignore this and infer statutory entitlements that Congress has not provided.

Next, although the weight of the patient's concern regarding the termination of a nursing home provider is relevant to the nature of the process which may ultimately be due, it is not determinative of the threshold question of whether or not the patients have a protectable interest in that decision. *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1974). If this were not so, there simply would be no limit to the application of the Due Process Clause. As the lower court recognized, programs like Medicaid

are pervasive in today's society. 166a, *Town Court v. Beal,* 586 F.2d at 289. That being so, the spectre of due process being triggered at every turn in the administration of these programs is a compelling reason for rejecting the Court of Appeals analysis. For example it would be impossible to effectively insure quality health care under Medicaid if before a physician could be terminated each of his Medicaid patients were required to be given prior notice and hearing on the matter. Similarly, if everyone indirectly affected by the termination or letting of a particular government contract had to be given prior notice and hearing on the question, government contracting would rapidly come to a complete standstill.

Like so many government programs today, Medicaid involves contractual arrangements between the government and the actual providers of the benefits, as well as a direct relationship between the individual recipient and the government. Although both the recipients and the providers must satisfy certain statutorily imposed standards to participate in the program, these eligibility determinations are entirely separate and distinct.[19] Just as the statute and regulations accord the provider no interest in the determination of a recipient's eligibility, neither does it create an interest in the recipient in determining the provider's qualifications. While it is undoubtedly true that the decision to terminate a facility such as Town Court is a matter of great importance to its residents, that alone is simply not sufficient to trigger the requirements of the Due Process Clause. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, supra; Meachum v. Fano,* 427 U.S. 215, 224 (1975); *Board of Regents of State Colleges v. Roth, supra.*

[19] Indeed, entirely different rules apply when a provider rather than a recipient is determined to be ineligible to participate in the program. Thus, while a recipient is entitled to prior notice and a hearing before his Medicaid benefits are terminated, a provider is only entitled to post termination review. *Compare* 44 Fed. Reg. 17932 (1979) (to be codified in 42 C.F.R. §431.200) (recipient's rights to hearing before termination of eligibility for Medicaid benefits) with 44 Fed. Reg. 9753 (1979) (to be codified in 42 C.F.R. §431.151 *et seq.*) (Hearing for the facility is not necessary until 120 days after termination).

Finally, the concurring opinion assumes that the patients would be competent to offer relevant information on the issue of whether or not the nursing home is in compliance with the requirements of the program. However, the conditions of participation for nursing homes in the Medicaid program are, of necessity, technical matters requiring expert evaluation. In these areas, the patients' opinions certainly will not significantly reduce the risk that the government will make a mistaken assessment of the nursing home's compliance. For example, it is unlikely that the residents of Town Court could offer any meaningful information on the professional qualifications of the medical staff or the fiscal responsibility of that facility. *Caton Ridge Nursing Home, Inc. v. Califano,* 447 F. Supp. 1222 (D. M.D. 1978, *aff'd* No. 78-1290 (4th Cir. filed Feb. 26, 1979). Indeed to the extent these matters may be in dispute, it is entirely reasonable to assume that the operator of the nursing home will bring all the relevant information to bear on the question in order to protect his investment. 186a, *Town Court v. Beal,* 586 F.2d at 297 (Seitz, C.J. dissenting).

Perhaps recognizing these difficulties, other Courts of Appeals in similar cases have reached a result contrary to that reached by the Court of Appeals in this case.

In *Moore v. Johnson*, 582 F.2d 1228 (9th Cir. 1978), the administrator of the Veterans' Administration decided that certain of its domiciliary care facilities were structurally deficient and could therefore no longer be used in the program. Accordingly, the residents were informed that they would be relocated to a qualified facility of their choice. The residents filed suit claiming a right to a pre-relocation hearing under the Due Process Clause of the Fifth Amendment.

The Court of Appeals for the Ninth Circuit, affirming the District Court, unanimously concluded that the plaintiffs' "belief that the Administrator *must* furnish domiciliary care and vocational training benefits at *specific facilities in Los Angeles* . . . are mere 'unilateral expectations.'" 582 F.2d at 1234 (emphasis in original). In *Moore*, the court noted that a contrary ruling would result in severe inflexibility in the administration of the program. Finally, the Court recognized that although the impact of the Administrator's decision was a matter of great urgency to the patients, this alone was insufficient to establish rights under the Due Process Clause. Addressing these concerns, the court pointed out that:

> Similar burdens always attend an extensive distribution of benefits by government; inescapably few get exactly what they want, while most, it is usually assumed, get more than they would have otherwise. All would get less if invariably the complaints of the many required elaborate hearings with all the trappings that only lawyers and judges can fully appreciate.

Moore v. Johnson, 582 F.2d at 1234.

The Court of Appeals for the Fourth Circuit has also reached this result in affirming a district court ruling in a factual setting akin to this case. In *Caton Ridge Nursing Home, Inc. v. Califano*, 447 F. Supp. 1222 (D. Md. 1978), a nursing home and a patient sought to enjoin both the State of Maryland and H.E.W. from terminating the home as a Medicaid provider, claiming rights similar to those asserted in this case. Recognizing that the "proper implementation of the Due Process Clause calls for a practical, pragmatic analysis", the district court dismissed the resident's complaint finding that the patients had no property interest at stake. *Id.* at 1226. The *Caton Ridge* Court was also concerned with the effect of a contrary finding on the administration of the program. The Fourth Circuit in an unpublished *per curiam* opinion affirmed the District Court's conclusion that the residents of Caton Ridge simply had no interest requiring that they be given a hearing before the facility could be terminated as a provider of services under the Medicaid program.[20]

The approach taken in *Moore* and *Caton Ridge* is correct. These decisions recognize that the termination of a provider such as Town Court simply ends a contractual relationship between the facility and the government, but does not deprive its residents of any of their statutory entitlements. Pennsylvania is nevertheless aware that the patients are affected by such a decision and does

[20] This opinion, although officially unpublished, can be found at CCH Medicare and Medicaid Guide—¶29,631 and is reproduced as Exhibit "A" to Respondent's Brief in Opposition to Petition for Writ of Certiorari at 13. In that opinion, the Court distinguished Klein because the nursing home deficiencies in Klein, as in Town Court, involved services to patients rather than structural defects in the facility itself. The lower court in Klein noted

not intend to minimize its seriousness here.[21] However, this does not alter the inescapable conclusion that the residents of Town Court stand in a significantly different position than did the welfare recipient whose benefits were summarily terminated in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the teacher whose contract was terminated in *Perry v. Sinderman, supra*, or the family whose utilities were summarily shut off in *Memphis Light, Gas and Water Division v. Craft, supra*. Unlike these cases, Town Court's residents, although affected by the decision to terminate the facility, have never had their Medicaid entitlements jeopardized or even brought into question.

This distinction is critical. Governmental decisions in the administration of the countless programs which currently exist for the public's benefit indirectly affect thousands, if not millions, on a daily basis. If these pro-

that when deficient services were involved, the patients could contribute relevant information on the point, whereas structural problems would apparently be beyond their competence. Klein v. Califano, 586 F.2d at 260 n. 17.

Although this may or may not be true, it is irrelevant to this inquiry. Whether or not a property interest exists in a given situation does not turn on the ability of a particular individual to offer relevant information on the question, but rather upon the nature of the interest which is affected. Meachum v. Fano, 427 U.S. 222, 224 (1975). It is nevertheless important to note that Pennsylvania's survey procedure does require the survey team to seek the views of the patients during compliance surveys. State Survey Agency Long Term Care Manual, U.S. Department of Health, Education and Welfare (Washington, D.C. 1975), Appendix A at 23.

[21] Recognizing the difficulties in the transfer of nursing home patients, Pennsylvania has developed a program to accomplish these relocations without needless inconvenience and suffering.

grams are not to become paralyzed in a procedural maze, their administrators must be given sufficient latitude to make the necessary administrative decisions promptly and efficiently. While Petitioner certainly does not urge that administrators be given unfettered discretion, the Court of Appeals decision in this case invites administrative paralysis. In the area of nursing home care for the disabled, the Petitioner must be able to quickly and effectively terminate unqualified nursing home providers under its Medicaid program. Such a decision of necessity affects many Medicaid residents; yet it would be entirely unreasonable to require a hearing in each case.

In fact this program has been used as a national model by H.E.W. See Technical Assistance Memorandum: Development of Nursing Home Patient's Relocation Plans, United States Department of Health, Education and Welfare (Feb. 19, 1975).

IX. CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner urges that the ruling of the Court of Appeals for the Third Circuit must be reversed.

Respectfully submitted,

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APPENDIX

42 U.S.C. §1396a (a) (28):

A State plan for Medical Assistance must provide that any skilled nursing facility receiving payments under such plan must satisfy all of the requirements contained in section 1395x (j) of this title, except that the exclusion contained, therein with respect to institutions which are primarily for the care and treatment of mental diseases and tuberculosis shall not apply for purposes of this subchapter;

42 U.S.C. §1395x (j):

Skilled nursing facility

The term "skilled nursing facility" means (except for purposes of subsection (a) (2) of this section) an institution (or a district part of an institution) which has in effect a transfer agreement (meeting the requirements of subsection (*l*) of this section) with one or more hospitals having agreements in effect under section 1395cc of this title and which—

(1) is primarily engaged in providing to inpatients (A) skilled nursing care and related services for patients who require medical or nursing care, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons;

(2) has policies which are developed with the advice of (and with provision of review of such policies from time to time by) a group of professional

personnel, including one or more physicians and one or more registered professional nurses, to govern the skilled nursing care and related medical or other services it provides;

(3) has a physician, a registered professional nurse, or a medical staff responsible for the execution of such policies;

(4) (A) has a requirement that the health care of every patient must be under the supervision of a physician, and (B) provides for having a physician available to furnish necessary medical care in case of emergency;

(5) maintains clinical records on all patients;

(6) provides 24-hour nursing service which is sufficient to meet nursing needs in accordance with the policies developed as provided in paragraph (2), and has at least one registered professional nurse employed full time;

(7) provides appropriate methods and procedures for the dispensing and administering of drugs and biologicals;

(8) has in effect a utilization review plan which meets the requirements of subsection (k) of this section;

(9) in the case of an institution in any State in which State or applicable local law provides for the licensing of institutions of this nature, (A) is licensed pursuant to such law, or (B) is approved, by the agency of such State or locality responsible for licensing institutions of this nature, as meeting the standards established for such licensing;

(10) has in effect an overall plan and budget that meets the requirements of subsection (z) of this section;

(11) complies with the requirements of section 1320a-3 of this title;

(12) cooperates in an effective program which provides for a regular program of independent medical evaluation and audit of the patients in the facility to the extent required by the programs in which the facility participates (including medical evaluation of each patient's need for skilled nursing facility care);

(13) meets such provisions of the Life Safety Code of the National Fire Protection Association (23d edition, 1973) as are applicable to nursing homes; except that the Secretary may waive, for such periods as he deems appropriate, specific provisions of such Code which if rigidly applied would result in unreasonable hardship upon a nursing home, but only if such waiver will not adversely affect the health and safety of the patients; except that the provisions of such Code shall not apply in any State if the Secretary finds that in such State there is in effect a fire and safety code, imposed by State law, which adequately protects patients in nursing facilities;

(14) establishes and maintains a system that (A) assures a full and complete accounting of its patients' personal funds, and (B) includes the use of such separate account for such funds as will preclude any commingling of such funds with facility funds or with the funds of any person other than another such patient; and

(15) meets such other conditions relating to the health and safety of individuals who are furnished services in such institution or relating to the physical facilities thereof as the Secretary may find necessary (subject to the second sentence of section 1395z of this title), except that the Secretary shall not require as a condition of participation that medical social services be furnished in any such institution. Notwithstanding any other provision of law, all information concerning skilled nursing facilities required by this subsection to be filed with the Secretary shall be made available to Federal or State employees for purposes consistent with the effective administration of programs established under subchapters XVIII and XIX of this chapter;

except that such term shall not (other than for purposes of subsection (a) (2) of this section) include any institution which is primarily for the care and treatment of mental diseases or tuberculosis. For purposes of subsection (a) (2) of this section, such term includes any institution which meets the requirements of paragraph (1) of this subsection. The term "skilled nursing facility" also includes an institution described in paragraph (1) of subsection (y) of this section, to the extent and subject to the limitations provided in such subsection. To the extent that paragraph (6) of this subsection may be deemed to require that any skilled nursing facility engage the services of a registered professional nurse for more than 40 hours a week, the Secretary is authorized to waive such requirement if he finds that—

(A) such facility is located in a rural area and the supply of skilled nursing facility services in

such area is not sufficient to meet the needs of individuals residing therein,

(B) such facility has one full-time registered professional nurse who is regularly on duty at such facility 40 hours a week, and

(C) such facility (i) has only patients whose physicians have indicated (through physicians' orders or admission notes) that each such patient does not require the services of a registered nurse or a physician for a 48-hour period, or (ii) has made arrangements for a registered professional nurse or a physician to spend such time at such facility as may be indicated as necessary by the physician to provide necessary skilled nursing services on days when the regular full-time registered professional nurse is not on duty.

42 U.S.C. §1396a (a) (23) (Supp. 1970):

A State plan for Medical Assistance must except in the case of Puerto Rico, the Virgin Islands, and Guam, provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services.

42 C.F.R. §405.1121 (K) (4):

Standard: Patients' rights. The governing body of the facility establishes written policies regarding the rights and responsibilities of patients and, through the administrator, is responsible for development of, and adherence

to procedures implementing such policies. These policies and procedures are made available to patients, to any guardians, next of kin, sponsoring agency(ies), or representative payees selected pursuant to section 205(j) of the Social Security Act, and Subpart Q of 20 CFR Part 404, and to the public. The staff of the facility is trained and involved in the implementation of these policies and procedures. These patients' rights policies and procedures ensure that, at least, each patient admitted to the facility:

Is transferred or discharged only for medical reasons, or for his welfare or that of other patients, or for nonpayment of his stay (except as prohibited by title XVIII or XIX of the Social Security Act), and is given reasonable advance notice to ensure orderly transfer or discharge, and such actions are documented in his medical record.

Supreme Court, U. S.
FILED
JUN 30 1979
MICHAEL RODAK, JR., CLERK

No. 78-1318

In The Supreme Court of the United States

OCTOBER TERM, 1978

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE, PENNSYLVANIA, PETITIONER

v.

TOWN COURT NURSING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement:	
A. The statutory and regulatory background	2
B. Proceedings below	6
Summary of argument	13
Argument:	
I. Petitioner's contentions may be reviewed by this Court	17
II. Medicaid patients have no "property" interest in the participation of a nursing home in the medicaid program, and they therefore do not have a right under the Due Process Clause to a hearing on the termination of the home's participation	21
A. Whether an interest is "property" depends on whether the statutory scheme creates a reasonable and mutual legitimate claim entitlement	23
B. The Medicare and Medicaid statutes and regulations create no legitimate and mutual expectations of entitlement on the part of patients to continued program participation by the particular nursing home in which they reside	26

C. The rationale of the concurring opinion does not support the conclusion that Medicare and Medicaid recipients have a constitutionally protected interest in continued program participation of the nursing home in which they reside 34

Conclusion 42

Appendix 1a

CITATIONS

Page

Cases

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 19

Arnett v. *Kennedy*, 416 U.S. 134 36

Bi-Metallic Investment Co. v. *State Board of Equalization*, 239 U.S. 441 31

Board of Regents v. *Roth*, 408 U.S. 564 ..... 14, 23-24, 36

Califano v. *Boles*, No. 78-808 (June 27, 1979) 39

Califano v. *Yamasaki*, No. 77-1511 (June 20, 1979) 41

Case v. *Weinberger*, 523 F.2d 602 ..... 10, 33

Caton Ridge Nursing Home v. *Califano*, No. 78-1290 (4th Cir. Feb. 26, 1979) ... 33

Cook v. *Bates*, [1978 Transfer Binder] Medicare and Medicaid Guide (CCH) ¶29,410 33

Craig v. *Boren*, 429 U.S. 190 31

Dandridge v. *Williams*, 397 U.S. 471 18

Dixon v. *Love*, 431 U.S. 105 26

Goldberg v. *Kelly*, 397 U.S. 254 42

Goss v. *Lopez*, 419 U.S. 565 42

GTE Sylvania, Inc. v. *Consumers Union of the United States, Inc.*, cert. granted, No. 78-1248 (May 14, 1979) 19

Greenholtz v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979) ..14, 16, 24, 25, 36

Hathaway v. *Mathews*, 546 F.2d 227 33

Industrial Union Dept, AFL-CIO v. *American Petroleum Institute*, cert. granted, No. 78-911 (Feb. 21, 1979) ... 20

Kissinger v. *Reporters Committee for Freedom of the Press*, cert. granted, No. 78-1088, (Apr. 16, 1979) 19

Klein v. *Califano*, 586 F. 2d 250 ..... 11, 22, 27, 29, 33, 39, 41

Leis v. *Flynt*, No. 77-1618 (Jan. 15, 1979) 24

Marshall v. *American Petroleum Institute*, cert. granted, No. 78-1036 (Feb. 21, 1979) 20

Marks v. *United States*, 430 U.S.188 34

Massachusetts Mutual Life Insurance Co. v. *Ludwig*, 426 U.S. 479 18

Matthews v. *Eldridge*, 424 U.S. 319 .....10, 22, 26, 36, 42

Meachum v. *Fano*, 427 U.S. 215 ..... 24, 26

Memphis Light, Gas and Water Division v. *Croft*, 439 U.S. 1 ..... 12, 26

Moore v. *Johnson*, 582 F.2d 1228 32

Nicobatz v. *Weinberger*, [1974] Medicare and Medicaid Guide (CCH) ¶27,427 33

Parham v. *J.L.*, No. 75-1690 (June 20, 1979) 42

Richardson v. *Perales*, 402 U.S. 389 42
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, cert. granted, No. 78-1651, (June 18, 1979) 19
Smith v. *Organization of Foster Families*, 431 U.S. 816 ..... 14, 22, 24
Southern Ry. v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979) 19
Town Court Nursing Center, Inc. v. *Beal*, 586 F.2d 266 ..... 10, 33
United States v. *New York Telephone Co.*, 434 U.S. 159 18
Wolf v. *McDonnell*, 418 U.S. 539 26

Constitution, statutes and regulations:

United States Constitution:
Fifth Amendment (Due Process Clause) 10, 14, 21, 22, 31
Sixth Amendment 30
Fourteenth Amendment 21

Social Security Act:

Medicare Act, Title XVII, 42 U.S.C. 1395 *et seq.* 2
42 U.S.C. 1395c 2
42 U.S.C. 1395f(a) 3
42 U.S.C. 1395x(j) 4, 1a
42 U.S.C. 1395x(j)(9) 4, 1a
42 U.S.C. 1395cc 3, 1a
42 U.S.C. 1395cc(a) 4, 1a
42 U.S.C. 1395cc(b)(2) 5, 1a
42 U.S.C. 1395cc(b)(2)(A) 5, 1a
42 U.S.C. 1395cc(c)(2) 4, 1a

42 U.S.C. 1395ff(a) 3, 2a
42 U.S.C. 1395ff(c) 6, 2a

Medicaid Act, Title XIX, 42 U.S.C. 1396 *et seq.* 2
42 U.S.C. 1396 2
42 U.S.C. 1396a(a) 3, 2a
42 U.S.C. 1396a(a)(23) 3, 15, 27, 28, 32, 2a
42 U.S.C. 1396a(a)(27) 3
42 U.S.C. 1396a(a)(28) 3, 4
42 U.S.C. 1396b 3
42 U.S.C. 1396d(b) 3
42 U.S.C. 1396g 4
42 U.S.C. 1396i 4, 3a
42 U.S.C. 1396i(a) 4, 3a

Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510-2520 18

Sup. Ct. R.:

Rule 10(4) 19
Rule 21(4) 19
42 C.F.R. 405.604(c)(2) 5
42 C.F.R. 405.614 5
42 C.F.R. 405.614(b) 5
42 C.F.R. 405.1510-1518 (1977) .. 6
42 C.F.R. 405.1502 5
42 C.F.R. 405.1530 6
42 C.F.R. 449.10(d)(3)(ii) 5
42 C.F.R. 449.12(a)(1)(ii)(B)(4) 4, 27, 28
42 C.F.R. 449.20 27

42 C.F.R. 449.30(a)(9) 5
42 C.F.R. 449.33(a)(9) 4
45 C.F.R. 205.10(a)(5) 27
45 C.F.R. 249.12 (a)(1)(ii)(B)(4)(1976) 6
Miscellaneous:
Department of Health, Education, and Welfare, *State Survey Agency: Long Term Care Manual* (1975) 18
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) .....

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24a-65a) is reported at 586 F.2d 280. The district court's order (Pet. App. 23a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on September 29, 1978. Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including February 26, 1979 (Pet. App. 68a, 69a). The petition was filed on that date

and was granted on April 16, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). We discuss at pages 17–21, *infra*, a question about this Court's jurisdiction.

QUESTIONS PRESENTED

Whether residents of a nursing home who are eligible for benefits under the Medicaid Program, 42 U.S.C. 1396 *et seq.*, have a constitutional right to notice and an opportunity for a hearing before federal and state agencies may decide that the nursing home is unqualified to participate in the program.

STATUTES INVOLVED

Pertinent parts of Title XVIII (Medicare) and Title XIX (Medicaid) of the Social Security Act, 42 U.S.C. 1395 to 1396j, are set forth in an appendix, *infra*.

STATEMENT

A. *The Statutory and Regulatory Background*

Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act, 42 U.S.C. 1395 to 1396j, establish programs for medical assistance to aged, disabled and financially needy persons.[1] The Medicaid program, which is primarily involved in this case, is jointly funded and administered by the federal government (through the Department of Health, Education, and Welfare) and participating states. States desiring to

[1] Medicare provides medical assistance primarily to aged and disabled persons (42 U.S.C. 1395c); Medicaid provides medical assistance primarily to financially needy persons (42 U.S.C. 1396).

participate in the Medicaid program must submit for the Secretary of HEW's approval plans for medical assistance; these must meet the statutory criteria set forth in 42 U.S.C. 1396a(a). Under such plans, qualified providers of medical services, such as skilled nursing facilities, enter into agreements of not more than 12-months' duration with the responsible state agency. The provider agrees to furnish medical services to eligible patients, and the agency agrees to pay the provider for such services.[2] The federal government then reimburses the state agency for a portion of these payments.[3] 42 U.S.C. 1396a(a)(23) also provides that state plans "must * * * provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required* * *."

The states are primarily responsible for administering the Medicaid program.[4] Under the statute and implementing HEW regulations, the states are responsible for determining the eligibility of patients for statutory benefits although HEW's regulations set out certain rules on the exercise of that function. For example, the regulations provide that before a state may terminate, suspend or reduce a patient's assistance, it must give the patient notice and an opportunity for a hear-

[2] 42 U.S.C. 1396a(a)(27) and (28). Medicare providers enter into similar agreements directly with HEW, and federal payments are made directly to the providers. 42 U.S.C. 1395f(a), 1395cc.

[3] 42 U.S.C. 1396b, 1396d(b).

[4] In contrast, the Medicare program is administered primarily by HEW.

ing.[5] The regulations also provide, in relevant part, that a participating nursing home must adopt policies and procedures to ensure that each resident "[is] transferred or discharged only for medical reasons or for his welfare or that of other patients * * *."[6]

The states and HEW share responsibility for determining whether particular nursing homes are qualified to participate in both the Medicare and Medicaid programs under the standards set forth in the statutes, regulations and state plans.[7] Before it may participate in either the Medicare or Medicaid program, the home and its administrator must be licensed or approved by the responsible state agency[8] and must obtain a certification from the Secretary of HEW that it is qualified to participate.[9] A home must satisfy statutory and regulatory requirements of health care, safety and sanitation;[10] state agencies (and, to a lesser extent, HEW)

[5] 45 C.F.R. 205.10(a)(5).

[6] 42 C.F.R. 449.12(a)(1)(ii)(B)(4).

[7] The standards for eligible nursing homes (or "skilled nursing facilit[ies]") set forth in Title XIX (Medicaid) incorporate by reference the standards set forth for such facilities in Title XVIII (Medicare). See 42 U.S.C. 1396a(a)(28), 1395cc(c)(2), 1396i.

[8] 42 U.S.C. 1395x(j)(9); 42 U.S.C. 1396g.

[9] 42 U.S.C. 1395cc(a); 42 U.S.C. 1396i(a). If, as in this case, a home participated in both the Medicare and Medicaid programs (*i.e.*, is a "dual facility"), it must obtain a certificate from the Secretary of HEW to participate in both programs. If it is a Medicaid-only provider, the states are solely responsible for qualifying the facility pursuant to the HEW-approved state plan and the standards set forth in the statutes and HEW regulations. There are other differences in the statutes and regulations between dual and Medicaid-only facilities that are not pertinent here and will not be discussed.

[10] 42 U.S.C. 1395x(j); 42 U.S.C. 1396a(a)(28).

conduct periodic surveys of facilities to ensure that those requirements are satisfied.

The Secretary of HEW may terminate a Medicare provider agreement (and thus a facility's participation in that program) whenever, on the basis of either state or HEW surveys, he determines that the facility is no longer in compliance with the terms of the agreement or the requirements of the statute or regulations.[11] HEW regulations under Medicaid require the participating state to terminate any Medicaid provider agreement on notification that HEW has not renewed, or has terminated, a facility's Medicare provider agreement.[12]

HEW must give a facility reasonable notice (defined in the regulations as not less than 15 days) before the effective date of termination.[13] When HEW gives a notice of termination to the home (referred to as an "initial determination"),[14] the statute and regulations provide several administrative remedies. First, the home may seek "reconsideration" of the initial determi-

[11] 42 U.S.C. 1395cc(b)(2)(A). The regulations distinguish for some purposes between a decision not to renew a provider agreement after the expiration of its one-year term and a decision to terminate an agreement during its term. See 42 C.F.R. 405.604(c)(2) and 42 C.F.R. 405.614. Both decisions, however, constitute an initial determination that the provider is not qualified, and both trigger the same administrative appeal procedures (*ibid.*). In this brief we sometimes use the term "termination" to refer to either decision.

[12] 42 C.F.R. 449.33(a)(9).

[13] 42 U.S.C. 1395cc(b)(2); 42 C.F.R. 405.614(b). Federal funding for services to patients continues for as long as 30 days after the effective date of the facility's termination, in order to provide for orderly relocation or other accommodations for the patients. 42 C.F.R. 449.10(d)(3)(ii).

[14] 42 C.F.R. 405.604(c)(2); 42 C.F.R. 405.1502.

nation, which entails a thorough review of the initial decision but not an evidentiary hearing.[15] If, after reconsideration, HEW affirms the initial decision to terminate, the facility is entitled to a full evidentiary hearing before the agency and, ultimately, to judicial review.[16] Under the statute and regulations, however, neither a request for reconsideration nor a request for an agency hearing postpones the effective date of the termination of payments to the home.

Procedures established by HEW for the conduct of nursing home certification surveys by state agencies (surveys must be conducted at least once a year in view of the maximum 12-month duration of provider agreements) provide for observations and interviews of patients on a number of matters.[17] The statutes, regulations, and procedures, however, do not provide Medicare or Medicaid patients with a right to notice or opportunity for a hearing, either before or after termination of the home, with respect to the decision to terminate the home's participation in the programs.

B. *Proceedings Below*

1. Respondent Town Court Nursing Center, Inc., is a 198-bed nursing home in Philadelphia, Pennsylvania

[15] 42 C.F.R. 405.1510–1518.

[16] 42 U.S.C. 1395ff(c); 42 C.F.R. 405.1530.

[17] See Department of Health, Education, and Welfare, *State Survey Agency: Long Term Care Manual* (1975). Appendix A of this Manual establishes survey procedures for state agencies responsible for surveying skilled nursing facilities. The procedures require that the surveyors interview a sample of patients with respect to such matters as the patients' understanding of their rights and their finances, the general treatment of patients, the quality of nursing care, the quality of food service, and the adequacy of patient activities.

(A.17a). Town Court was certified by HEW in 1967 as a "skilled nursing facility" and thus became eligible for program participation (A.31a). Although subsequent certification surveys revealed various deficiencies, Town Court remained in operation through 1973 by submitting plans for correcting the deficiencies. In 1974, however, a series of inspections revealed substantial noncompliance.[18] and Town Court was terminated as a Medicare and Medicaid provider (A.32a–33a).

Town Court was recertified in 1976 and entered into Medicare and Medicaid provider agreements with HEW (for Medicare) and the Pennsylvania Department of Public Welfare (for Medicaid) (A.33a). Shortly after the issuance of the 1976–1977 provider agreements, a special state grand jury was empanelled to study conditions in nursing homes in Philadelphia. In response to complaints of the grand jury about Town Court (C.A. App. 474–499),[19] HEW conducted its own survey of the home in July 1976 (A.33a–34a, 61a–108a). The survey was conducted over the course of a week; it involved examination of some 66 patient files and direct observations and interviews with patients, and the surveyors

[18] Surveyors cited the following findings: prescribed medications not administered or incorrectly administered; no vital signs recorded for weeks; nursing care plans not done or incomplete; patients' complaints of rough handling and verbal abuse; scheduled nursing personnel not present; no food or juice available; soiled bedpans and catheter bags on floor; and strong odor of urine present (A. 39a–48a, 50a–57a, 60a–61a). The survey teams concluded that the conditions in the facility constituted a threat to the health and safety of its patients and recommended termination of its participation (A.54a, 61a).

[19] "C.A. App." refers to the appendix to the briefs in the court of appeals.

found significant deficiencies (*ibid.*).[20] HEW furnished these findings to the State's survey agency and requested further investigation (A.63a).

The State's survey agency conducted a series of surveys and meetings with Town Court. These surveys, conducted in November 1976 and March 1977, revealed numerous deficiencies relating to inadequate nursing and physician services, physical environment, medical records, management, medical direction and pharmaceutical services.[21] The State recommended that HEW not renew Town Court's Medicare provider agreement, which was due to expire April 30, 1977. By letter of May 17, 1977, HEW notified Town Court of its decision to terminate the facility's participation in the Medicare program and set the effective date of termination as June 18, 1977 (A. 294a–296a). The letter stated that no Medicare payments would be made to Town Court for services to Medicare beneficiaries furnished after July 17, 1977 (A. 297a). As required by the statute and regulations, on May 20, 1977, the Pennsylvania Department of Public Welfare notified Town Court of its termination from the Medicaid program as well (A. 291a–293a). Town Court then requested that HEW reconsider the termination decision (A. 28a).[22]

2. On July 20, 1977, before HEW had acted on its request for reconsideration, Town Court and six of its patients[23] filed this action in the United States District Court for the Eastern District of Pennsylvania, seeking declaratory and injunctive relief (A. 7a–14a). The home contended that it is constitutionally entitled to a full evidentiary hearing prior to its termination as a provider (A. 9a–10a, 12a). The patients contended that they also were entitled to a hearing before the home's termination, on the ground that they would suffer a loss of benefits if the home were decertified (A. 11a).

On July 27, 1977, the district court granted a preliminary injunction, enjoining the State and HEW from (1) discontinuing or withholding payments to Town Court for the care of Medicare and Medicaid beneficiaries; (2) removing patients from the home; or (3) prohibiting the placement of new patients at the home, until HEW had

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[20] The HEW survey concluded, *inter alia*, that "[t]here is no evidence that the medical director is involved in the coordination of medical care in the facility" (A.64a) and that a pattern of poor nursing care was jeopardizing the health and safety of patients (*id.* at 71a). The survey took particular note of patient injuries and faulty nursing techniques (*id.* at 70a–72a).

[21] A state survey in November 1976 found serious deficiencies in nursing care and sanitation. Observations included patients in need of showers, with dirty and torn clothing, and barefoot. Patient areas were dirty, roaches were observed, and urine odor was prevalent. Medical records were seriously deficient (A.111a–113a). In March 1977 a combined Medicare/Medicard certification and state licensing survey found that significant deficiencies continued to exist (C.A. App. 341–412), and these findings were submitted to HEW with the recommendation that the home's provider agreements not be renewed.

[22] In May 1977, the special investigating grand jury filed a presentment against Town Court, recommending filing of charges of reckless endangerment of the lives of the patients, violations of state regulations, and theft by deception. The basis for the charge of reckless endangerment included two cases of gangrene that progressed unobserved until amputation was required (C.A. App. 479–482), as well as testimony by a physician which indicated that 12 out of 13 files reviewed revealed "serious deficiencies in patient care" that necessitated hospitalization (*id.* at 483).

[23] The suit was brought as a proposed class action on behalf of the 180 Medicaid patients at Town Court (A. 11a). The district court made no determination concerning the request for class certification.

acted on Town Court's application for reconsideration (C.A. App. 222–223).[24]

On September 9, 1977, HEW notified Town Court that the initial termination decision had been affirmed on reconsideration (A. 28a). The plaintiffs then asked the district court to extend the preliminary injunction (A. 28a–29a). On September 15, 1977, the district court entered an order stating (A. 117a):

> That plaintiffs' Motion is DENIED, and the preliminary injunction is DISSOLVED: provided, however, that the defendants shall not withhold payments for services actually provided to patients.

Town Court and its patients filed separate appeals from the portion of the district court order adverse to them, and the Secretary of HEW appealed from the portion of the judgment adverse to him. Petitioner's predecessor did not file an appeal; he appeared as an appellee in the court of appeals.

The court of appeals, sitting en banc, issued two separate opinions. The court held that Town Court was not constitutionally entitled to a pretermination evidentiary hearing. *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 266 (3d Cir. 1978) (hereinafter "nursing home"). Relying on *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Case* v. *Weinberger*, 523 F.2d 602 (2d Cir. 1975), the court held that the home's right under the statutes and regulations to an evidentiary hearing after termination is adequate to satisfy the Due Process

[24] The preliminary injunction was entered orally (C.A. App. 222). The court stated that the temporary restraining order issued on July 21, 1977 (A. 22a–23a) would remain in effect and that "[i]t is understood" that the defendants would not intentionally remove patients or prohibit the placement of new patients (C.A. App. 222–223).

Clause (586 F.2d at 277–278). It observed, as a particularly relevant consideration, that providing pretermination hearings to providers would place substantial burdens on "the scarce financial and administrative resources" of the responsible agencies and would be adverse to the "strong [public] interest in insuring that elderly and infirm nursing home patients are not required to stay in non-complying homes* * *" (*id.* at 278).[25] Town Court did not file a petition for a writ of certiorari to review this decision.

The patients fared better than the home. The court concluded that the patients have a constitutional right to a hearing before the home's participation in the program can be ended (Pet. App. 27a–60a; hereinafter "patients"). The opinion for four of the nine judges (*id.* at 27a–30a) relied entirely on the opinion of the court filed the same day in *Klein* v. *Califano*, 586 F.2d 250 (3d Cir. 1978) (en banc). In *Klein* the court acknowledged that the termination of a nursing home's eligibility does not affect the patients' eligibility for or right to benefits under the Medicare and Medicaid programs (586 F.2d at 257), but it nevertheless concluded (*id.* at 258) that the statutes and regulations gave the patients a "prop-

[25] The court of appeals therefore directed (568 F.2d at 280) that "[t]he order of the district court refusing to extend portions of the preliminary injunction will be affirmed as to Town Court. The order of the district court continuing in effect part of the preliminary injunction will be reversed as to Town Court * * *."

Although the court concluded that Town Court had asserted a claim against petitioner that rested "on a basis independent from that supporting the claim against Secretary Califano" (586 F.2d at 279), it held that petitioner also was not required to provide Town Court with a pre-termination hearing in view of the adequacy of Town Court's rights to a post-termination hearing under the entire statutory and regulatory system (*id.* at 280).

erty" interest in continued residence in a particular nursing home:

> Because a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.

See also Pet. App. 29a. The court in patients therefore held that "the portion of [the district court's] order from which Secretary Califano appeals will be affirmed" (*id.* at 30a). The opinion of the four judges here—like the court's opinion in *Klein*—declined to express a view on what sort of pre-termination hearing would be required; the court instead remanded the case to the district court for further proceedings on that question (*ibid.*).

A concurring opinion for four judges (including two of the four who joined the opinion announcing the judgment), concluded that, although the interests of patients created by the statutes and regulations (relied on by the lead opinion) might not, taken alone, amount to a "property" interest, "when viewed together, they compel the conclusion that they identify three aspects of an 'underlying substantive interest' that enjoys the stature of property" (Pet. App. 39a, quoting from *Memphis Light, Gas and Water Division* v. *Craft*, 436 U.S. 1, 9 (1978)). The concurring opinion also concluded that the practical effect of the home's termination on patients supported the conclusion that they have a property interest in its continued participation (Pet. App. 44a-45a); the concurrence stated that the growth of federal welfare programs should make courts "alert for and receptive to claims for due process protection of these new forms of property* * *" (*id.* at 46a).[26]

Three judges dissented (Pet. App. 60a-67a). In their view, the statutes and regulations provide Medicare and Medicaid beneficiaries with no "property" interest in the continuation by the home in which they reside of participation in the programs. Thus, the dissenters reasoned, the patients have no constitutional right to a hearing with respect to the home's termination (*id.* at 62a). The dissenting opinion also noted that existing state and federal procedures provide for significant contributions by patients to the survey process and that the home itself reasonably "may be expected to adduce the best case for continued certification" (*id.* at 63a-65a).

SUMMARY OF ARGUMENT

I

Although petitioner's predecessor did not file an appeal from the portion of the district court judgment adverse to petitioner, this Court may review

[26]The concurring opinion also addressed the question, not reached in *Klein* or in the opinion announcing the judgment, of what sort of hearings are constitutionally required (Pet. App. 46a-59a). Although the concurring opinion described as "informal and flexibly-structured" (Pet. App. 56a) the procedures the four judges would require, these procedures included "assembl[ing] the residents of the facility for an informal opportunity to express their views"; an explanation of the "contemplated [termination], the reasons for it, and its potential effect on the patients"; supplemental "individual interviews with those patients who did not attend"; an "opportunity to present material both orally and in writing * * * and [if necessary] assistance in formulating their responses"; and similar opportunities for "relatives, friends, or other representatives" (*id.* at 57a-58a).

petitioner's contention that nursing home patients have no "property" interest in the continued participation of a particular nursing home in the Medicaid program. The court of appeals had jurisdiction to decide that question in petitioner's favor because the Secretary of HEW appealed from the portion of the judgment in question, and petitioner was not required to file a separate and duplicative appeal. The court of appeals having fully considered the question and decided it adversely to petitioner, she may seek this Court's review.

II

Whether a person who is affected by governmental action is entitled to the procedural protections of the Due Process Clause depends on whether "liberty" or "property" is at stake. Whether an interest is "liberty" or "property" depends not on the magnitude of the effect of governmental action on a person but on whether the person has a legitimate claim of entitlement in the matter. The principal sources of such expectations, particularly in this context, are statutes and rules having the force of law. See, *e.g.*, *Greenholtz* v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979); *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

A. Nothing in the Medicare or Medicaid statutes and their implementing regulations establishes or suggests any right on the part of patients to benefits for medical care provided to them by a *particular* nursing home. The statutes and regulations establish that eligible patients have a right to covered care only from any "institution * * * qualified to perform the

service" (42 U.S.C. 1396a(a)(23)) under statutory standards defining qualified institutions and under statutory procedures for determining the qualifications of nursing homes and other providers of covered medical services. As the court of appeals acknowledged, a determination by the Secretary of HEW and responsible state officials that a particular home is not qualified does not affect either a patient's eligibility for benefits or the level of benefits provided in fact. A home's lack of qualification is a legitimate ground for terminating Medicare and Medicaid payments to the home and thus requiring patients to move to another home. No patient has a legitimate claim of entitlement that a particular place be found "qualified." The patients thus have no "property" interest in the status of a particular home as a qualified provider and no constitutional right to notice and a hearing on determinations of that status.

B. Although the court of appeals' analysis of the statutory scheme and the constitutional issues is not entirely clear, the opinion announcing the judgment of the court suggests that even if the patients' interest is only in receiving care from a qualified home, a determination that a particular home is not qualified impinges sufficiently on that interest that "property" is at issue. That view finds no support in this Court's decisions, and, if accepted, it would require due process procedures in innumerable situations in which no one could have a reasonable expectation of entitlement. It would mean that whenever governmental action directed primarily against the interests of one party (*e.g.*, the termination or non-renewal of a company's defense contract) affects the constitutionally protected interests of other persons (*e.g.*, the com-

pany's employees' right to work for an employer of their choice), each person thus indirectly affected would have a separate and personal right to notice and hearing on that action. That view would make the nature of the affected interest largely irrelevant and the weight of the interest controlling, contrary to established principles.

C. The concurring opinion, joined by four members of the court, offers arguments quite distinct from the opinion announcing the judgment of the court. First, the concurring opinion argues that even if no statutory or regulatory provision, considered alone, establishes a "property" interest, together they "paint * * * [a] landscape of a 'legitimate claim of entitlement' that Medicaid beneficiaries can assert" (Pet. App. 39a). "Landscapes," however, do not establish legitimate and mutual claims of entitlement. For courts to infer such entitlements not from the precise substantive entitlements established by Congress but from vague and undefined landscapes is simply to override the carefully crafted statutory scheme and to base "property" rights solely on unilateral expectations.

The concurring opinion also argues that the practical consequences of patients' moving from one nursing home to another support judicial recognition of constitutionally protected interests. That conclusion conflicts squarely with decisions establishing that the magnitude of the effect of governmental action, "however serious," is not relevant in determining whether the interest is "liberty" or "property." *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, slip op. 5.

The concurring opinion's concern that decisions to

terminate the program participation of a nursing home may be important to patients is shared by HEW, which intends to institute rulemaking to consider what procedures should be employed as a matter of administrative policy for enhancing patient participation in the survey and termination process. But those concerns are no basis for finding constitutionally protected property rights. Moreover, the concurring opinion's focus on the consequences to the patients of moving, consequences that would be one factor among many in making a policy decision to offer hearings, overlooks other significant considerations relevant to that decision. For example, all patients have an interest in receiving the level and quality of care that Congress and the states intended. All patients thus are affected by the potency of available sanctions, including termination and non-renewal of provider participation, designed to ensure that homes maintain those statutory standards. A hearing rule that makes the threat of sanctions less effective therefore has a potential to undermine the interests of all patients.

ARGUMENT

I

PETITIONER'S CONTENTIONS MAY BE REVIEWED BY THIS COURT

The district court's order in this case purported to deny in part and grant in part the relief sought by Town Court and its residents (see page 10, *supra*). Because petitioner's predecessor did not appeal from the portion of the order adverse to him, but instead

appeared as appellee in the court of appeals, it may be questioned whether petitioner properly can ask this Court to reverse the court of appeals on grounds that would require vacating the portion of the district court's order that was adverse to petitioner but from which her predecessor did not appeal.

Ordinarily an appellee may, without filing a cross appeal, defend a judgment in his favor on any grounds (including those rejected by the lower court), but he may not ask for an alteration of the judgment in his favor. See, *e.g.*, *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).[27] And if an issue was not properly pre-

[27]Our brief in *New York Telephone* argued that a party who prevailed in a lower court may make any properly preserved argument in support of his judgment. So long as he is content to accept an affirmance, he may even make an argument that, if accepted, would entitle him to greater rights in future cases. In *New York Telephone* itself the lower courts held that warrants may issue authorizing the installation of pen registers, but that courts may not order telephone companies to assist in the installation. The judgment of the lower courts thus was that federal agents could come on the telephone company's property—using force if necessary—to install pen register devices, but that they could not obtain assistance. The telephone company defended this judgment on the ground that no warrant could be issued authorizing the installation of a pen register unless it conformed to the procedural requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510–2520; this contention, if accepted, would have given the telephone company broader rights. The Court nonetheless considered the telephone company's contention, because the company as respondent did not ask for an alteration of the judgment. See also R. Stern & E. Gressman, *Supreme Court Practice* 480–486 (5th ed. 1978), which supports the view that an appellee or respondent, so long as he does not seek alteration of a judgment, may defend the judgment with arguments that call its scope into question.

served in a lower court, this Court ordinarily declines to review it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). We do not believe, however, that these principles now bar petitioner from contending that patients have no "property" interest in Town Court's continued participation in Medicaid.

The holding in favor of the patients was in fact appealed to the court of appeals (albeit by the Secretary of HEW), and the arguments now raised by petitioner were presented to and decided by that court. Petitioner did not file an appeal because it did not need to; there was no reason to file surplus notices of appeal.[28] The court of appeals had power to reverse the part of the district court's judgment that favored the patients; it was asked to do so in a proper fashion;

[28]The Rules of this Court contemplate that appellees and respondents can join appellants or petitioners in urging reversal of judgments without filing separate appeals or petitions. See Rules 10(4), 21(4). Because the grant of review brings up the whole case, the Court can dispose of any challenge to the judgment below, provided that it was both preserved in the lower court and raised in the jurisdictional statement and petition. It would be pointless to require the filing of additional petitions by parties who, although aggrieved by the judgment below, are willing to have the case decided on the basis of the question presented by the first petition. Because of this consideration, the Solicitor General frequently refrains from filing petitions in cases in which other parties have done so, and in such cases the government, although a respondent, asks the Court to reverse the judgments. In addition to this case (in which the Secretary of HEW is a respondent calling for reversal of the judgment), several other cases now before the Court follow this pattern. See, *e.g.*, *Kissinger* v. *Reporters Committee for Freedom of the Press*, cert. granted, No. 78–1088 (Apr. 16, 1979); *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, cert. granted, No. 78–1248 (May 14, 1979); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, cert. granted, No. 78–1651 (June 18, 1979). See also *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78–575 (June 11, 1979), in which the United

petitioner was aggrieved by the refusal to reverse; and petitioner thus is entitled to seek review of the portion of the judgment from which the Secretary of HEW appealed. Petitioner's right to seek review of the remaining portion of the judgment is even clearer. The Third Circuit reversed, on the patients' appeal, a part of the judgment that had been favorable to petitioner (see Pet. App. 30a). Petitioner surely is authorized to seek review of an adverse judgment that she suffered as appellee in this fashion.

The more difficult question is whether petitioner properly preserved the arguments she now presents to this Court. The brief filed in the court of appeals by petitioner's predecessor stated (page 3) that because "Secretary Beal participates neither in the decision-making of the survey agency nor in the decisionmaking of the federal agency, he will not take a position on the legal or factual issues raised by the appeal. Secretary Beal's role is basically that of a stakeholder and his position should not be inferred to be either for or against the position of either the federal agency or the nursing facility." Because this Court ordinarily considers only arguments properly preserved below, it may be that petitioner's failure to make *any* argument on the merits in the Third Circuit is fatal to petitioner's position.

States, as respondent, requested the Court to reverse the court of appeals' judgment. The United States generally files a petition (after a private petition has been filed) only when it seeks to present for this Court's review a question that was not presented by the first petition. See, *e.g.*, *Marshall* v. *American Petroleum Institute*, cert. granted, No. 78-1036 (Feb. 21, 1979), which was filed in order to present a question that had not been included by petitioners in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, cert. granted, No. 78-911 (Feb. 21, 1979).

Although the question is close, we submit that the Court may consider the arguments now before it. All of the arguments were made to the court of appeals, even if not by petitioner. As we have shown above, petitioner has standing to seek review; the only inhibition concerns the nature of the arguments petitioner may make. And that inhibition is of less concern where, as here, the party who made the contentions in the court of appeals (the Secretary of HEW) has appeared and made them again in this Court. In sum, the court of appeals had jurisdiction, this Court has jurisdiction, the essential arguments were presented to and resolved by the Third Circuit, and they are presented again to this Court by a party who presented them below. This Court therefore should address them.

II

MEDICAID PATIENTS HAVE NO "PROPERTY" INTEREST IN THE PARTICIPATION OF A NURSING HOME IN THE MEDICAID PROGRAM, AND THEY THEREFORE DO NOT HAVE A RIGHT UNDER THE DUE PROCESS CLAUSE TO A HEARING ON THE TERMINATION OF THE HOME'S PARTICIPATION

If a person contends that he is entitled under the Due Process Clause of the Fifth and Fourteenth Amendments to certain procedural protections with respect to governmental action affecting him, courts must engage in a two-step inquiry; first, they must determine

whether the interest allegedly affected is "liberty" or "property" within the meaning of the Clause; if it is, the courts then must determine what process is due under the circumstances. See, *e.g.*, *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 838–847 (1977); *Mathews* v. *Eldridge*, 424 U.S. 319, 332–335 (1976). The principal issue in this case concerns the first step of the inquiry: whether the respondent patients have a "property"[29] interest in the nursing home's status as a provider.[30]

No one disputes in this case that eligible persons are entitled under the Medicare and Medicaid statutes to covered medical care from qualified providers; eligible persons also have a right under both the statute and the regulations to a hearing before their benefits are terminated. Moreover, as the court of appeals acknowledged, the termination of one provider's participation in the programs does not affect or diminish the patients' entitlement to receive benefits from other qualified providers. *Klein* v. *Califano*, 586 F.2d 250, 259 (3d Cir. 1978) (en banc). Nevertheless, the majority of the en banc court held that the patients have a "property" interest in the continued participation in the program of the particular nursing home in which they resided—an interest that the court derived from rights conferred by the statutes and regulations and from the practical effects of the home's termination on the patients (Pet. App.

[29] If the patients have any cognizable interest under the Due Process Clause, it is more aptly characterized as a "property" interest than as a "liberty" interest, and we will refer to it that way here.

[30] The opinion announcing the judgment addressed the second step of the inquiry only to the extent of holding that a hearing must be held before, rather than after, the effective date of the

27a–30a, 44a–45a).[31] We submit that the court of appeals has misconceived the proper standards for determining "property" interests and misconstrued the rights that the applicable statutes and regulations provide to eligible patients.

A. *Whether An Interest Is "Property" Depends Primarily On Whether The Statutory Scheme Creates A Reasonable and Mutual Legitimate Claim of Entitlement*

The procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction effects the interests of a particular person or group. By its terms, the Clause applies only in those circumstances in which governmental action deprives a person of "liberty" or "property." There is no talismanic test for determining whether a person's interest in a matter is "liberty" or "property," but this Court's decisions have identified a number of relevant principles and considerations.

First, what is relevant is "not * * * the 'weight' but * * * the *nature* of the interest at stake." *Board of Re-*

termination (Pet. App. 29a). It did not, however, prescribe the details of the required procedure, and it remanded for further proceedings on that issue. (*id.* at 29a–30a). As we have noted (note 26, *supra*), the concurring opinion of four of the members of the majority prescribed in some detail what procedures were required (Pet. App. 46a–59a).

[31] The opinion of the court in *Klein* relied primarily on rights believed to have been conferred on patients by specific statutory and regulatory provisions (586 F.2d at 257–258), while the concurring opinion relied more on the "landscape" "paint[ed]" by those provisions (Pet. App. 39a) and on the practical effects of the home's termination on its patients (*id.* at 44a–45a). In this case the views expressed in the concurring opinion are at least as significant as those expressed in the opinion that announced the judgment, because the concurring opinion was joined by four of the six members of the majority. See pages 34–40, *infra*.

gents v. *Roth*, 408 U.S. 564, 571 (1972). See also *Smith* v. *Organization of Foster Families, supra*, 431 U.S. at 840; *Greenholtz* v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979), slip op. 5: "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations." If the "weight" of a decision's consequence were a determinative factor, there would be no discernible limits to the number of interests protected, and the hearings required by the Due Process Clause that would thus be imposed on a host of governmental actions would constitute an enormous, if not intolerable, burden on governmental decisionmaking.[32] See, *e.g.*, *Meachum* v. *Fano*, 427 U.S. 215, 224-225 (1976).

Second, the nature of the interest must be such that a person has a legitimate claim of entitlement to it. There must be some mutual expectations; a unilateral claim is not enough, even if supported by a course of practice. See, *e.g.*, *Leis* v. *Flynt*, No. 77-1618 (Jan. 15, 1979), which holds that out-of-state lawyers have no property interest in appearing pro hac vice in a state court because they have no expectation of entitlement "derived

[32] For example, whether the government decides to enter into, or cancel, a defense contract with a company may mean the difference between economic prosperity or depression for a large community, but few would contend that every member of the community has a "property" interest in the governmental decision whether Lockheed's latest fighter is faster or a better buy for the government than Northrop's competing plane. If a hearing had to be given to every member of the community on contract questions on which the company itself had a right to be heard, final governmental decisions on such matters would be all but impossible.

from statute or legal rule or through a mutually explicit understanding" (slip op. 5).[33]

Third, legitimate claims of entitlement may be based on several sources, including contract, informal practices, custom and usage;[34] but the principal source of such expectations, and the principal criteria for determining whether they are legitimate and mutual, are statutes and rules having the force of law. As a number of this Court's recent decisions reflect, whether a person has a legitimate claim of entitlement usually depends on a careful analysis of the statutory language, structure and intent. Thus, for example, in *Greenholtz* v. *Nebraska Penal Inmates, supra*, the Court held that Nebraska inmates have a protected interest in parole release only because of the "unique structure and language" of the state statute (slip op. 10). The statute created an expectation of release that could be defeated only by specified findings. In other cases the Court also has emphasized that the existence of a property inter-

[33] The requirement that the person's claim be more than simply unilateral can be illustrated in many ways. For example, a person may have a reasonable expectation of appointment to high executive office, and the appointment may mean a great deal to him and his family, but he clearly has no property interest in the appointment because there is nothing to indicate that the President in fact shares, or has any legal obligation to share, the same expectation.

[34] Practices, custom and usage are enough only if they have acquired a powerful and mutual force. The facts that most prisioners are paroled, that most are not transferred from prison to prison, that most applications to appear pro hac vice are granted, and that most teachers' contracts are renewed do not create any liberty or property interests in the expectation that these general patterns will hold true for particular persons. See *Greenholtz* v. *Nebraska Penal Inmates, supra; Meachum* v. *Fano, supra; Leis* v. *Flynt, supra; Board of Regents* v. *Roth, supra.*

est turns on whether a statute or rule creates an entitlement conditioned on the existence of particular facts. *Memphis Light, Gas and Water Division* v. *Craft*, 436 U.S. 1, 9–12 (1978); *Dixon* v. *Love*, 431 U.S. 105, 112–113 (1977); *Meachum* v. *Fano*, *supra*, 427 U.S. at 226–227; *Wolff* v. *McDonnell*, 418 U.S. 539, 546 (1974); *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 332.

The language and structure of statutes and regulations should be dispositive in determining whether a person has a legitimate and mutual expectation of entitlement in matters relating to complex social welfare programs such as Medicare and Medicaid. If the rules create a particular substantive entitlement turning on provable facts, there is a "property" interest; otherwise there is not. Reliance on "practices," a shaky short of interest at best (see note 34, *supra*), cannot be the source of an interest not conferred by such statutes; otherwise the beneficiaries of a program would have substantive entitlements more extensive than Congress created for them. As we argue below, the statutes and regulations defining patients' entitlements create only a precisely limited interest in continued residence at a *particular* nursing home, and the removal of Town Court from the program does not affect any patient's legitimate claims of entitlement.

B. *The Medicare and Medicaid Statutes And Regulations Create No Legitimate And Mutual Expectations of Entitlement on the Part of Patients To Continued Program Participation By the Particular Nursing Home In Which They Reside*

Klein v. *Califano*, *supra*, on which the court relied here, invoked two provisions of the Medicaid statute

and implementing regulations as support for its conclusion that Medicaid patients have a property interest in the continued program participation of the nursing home in which they reside.[35] First, it cited 42 U.S.C. 1396a(a)(23), which provides that "any individual eligible for medical assistance * * * may obtain such assistance from any institution * * * qualified to perform the service * * *." Second, it cited 42 C.F.R. 449.12(a)(1)(ii)(B)(4),[36] which provides that every participating nursing home must establish policies and procedures to ensure that each resident "[i]s transferred or discharged only for medical reasons or for his welfare or that of other patients * * *."[37] The court concluded (586 F.2d at 258) that these provisions,

[35] Although this case directly involves only the Medicaid program, the due process considerations pertaining to that statute pertain also to the Medicare program. Because the administration of the two programs is related, we will usually not distinguish between the two programs.

[36] Formerly codified and cited by the court as 45 C.F.R. 249.12(a)(1)(ii)(B)(4)(1976).

[37] The court in *Klein* also noted (586 F.2d at 257) another provision, which entitles patients to notice and an opportunity for hearing with respect to agency action "resulting in suspension, reduction, discontinuance or termination of assistance." 42 C.F.R. 449.20. The district court in *Klein* relied on that provision to find a protectable property interest because it concluded that termination of the home caused trauma to Medicaid patients required to relocate to another facility and that termination had the effect of reducing those patients' level of benefits by the amount of the "transfer trauma." See 586 F.2d at 259 n. 16. The court of appeals found it unnecessary to address that conclusion (*ibid.*). The conclusion is insubstantial. The "assistance" referred to by the regulation is the monetary amount of benefits, not the psychic welfare that the benefits provide. If the regulation meant to refer to broader psychic considerations—which could include the entire regimen of patient care, down to the color of paint on the walls—surely it would have said so.

permitting a recipient to obtain medical care from a freely selected provider and * * * prescribing limited conditions for transferring a resident of a nursing home created a legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer.

What this conclusion means is not clear. To the extent it suggests that patients have a statutory right to covered care by any nursing home of their choosing, whether or not it is a qualified nursing home under the statutory standards, it is manifestly incorrect. No statute or regulation creates such a right. That would be contrary to the express language of 42 U.S.C. 1396a(a)(23), which entitles eligible patients to obtain medical assistance only from "any institution * * * *qualified* to perform the service" (emphasis supplied). No rule suggests that any patient has an interest or legitimate claim of entitlement that a particular home be deemed qualified. And unless a home is found qualified, the entitlement created by the statute does not come into play.

Moreover, the regulation restricting transfers of patients[38] is by its terms and plain intent (as the concurring opinion expressly acknowledged (Pet. App. 39a))[39] a limitation only on actions by qualified *providers* against patients; it establishes no entitlement with respect to action against the provider, and it does not require that any provider be deemed qualified. The regulation simply limits the discretion of

[38]42 C.F.R. 449.12(a)(1)(ii)(B)(4).

[39]The concurring opinion states (Pet. App. 39a): "Similarly, the majority [opinion] undoubtedly acknowledges that the provision that places limitations upon transfer or discharge is addressed only to the facility, not to HEW."

qualified providers to transfer patients because of facts personal to the patients; it does not limit the discretion of HEW to terminate providers because of facts personal to the providers. It does not promise patients that any provider will be retained in the program.

The *Klein* court recognized (586 F.2d at 258) that a determination that a home was unqualified would be a legitimate cause for transferring the patients; it must follow that neither the statute nor the regulation establishes a legitimate claim of entitlement to residence in a particular home.

The *Klein* opinion thus suggests that it may be based on an alternative rationale, which was expressly endorsed by the concurring opinion (Pet. App. 43a)—that even if an eligible recipient has a property interest only in receiving care from a qualified provider, a governmental determination that the provider is not qualified "impinges" on that interest and gives the recipient procedural rights with respect to that determination. See 586 F.2d at 258. If that is the basis of the court's holding, it would have consequences far beyond the administration of the Medicare and Medicaid programs. What the patients challenge in this case is governmental action directed against and primarily affecting the interests, not of the patients, but of a third party—the nursing home. If the court of appeals were correct that governmental action with respect to A must be preceded by hearings for B, C, D, and E, who may be affected by A's response to the governmental decision, then due process procedures would be required in a host of situations in which, we submit, no one could have a reasonable expectation of entitlement.

For example, a worker may have a constitutionally protected liberty interest in working for the employer of his choice, including an employer performing government contracts. A worker also may have a "property" interest in employment under a contract or collective bargaining agreement. He may be very substantially affected by government cancellation or non-renewal of his employer's contract. The court of appeals' analysis suggests that such cancellation or non-renewal would impinge on the worker's "liberty" or "property" interests, and that every worker therefore would have a personal right to notice and an opportunity to be heard with respect to that action. Similarly, because a criminal defendant may have a Sixth Amendment right to be represented by an attorney of his choosing, every one of an attorney's clients would have a personal right to be heard on the matter of his lawyer's disbarment. In the context of the Medicare and Medicaid statutes, the principle suggested by the court of appeals would mean that patients have a right to notice and hearing with respect not only to actions seeking to terminate the program participation of their nursing homes but also to actions seeking to revoke the professional licenses (and thus the program participations) of their physicians, pharmacists, or any other provider of medical services. Contrary to the suggestion of the court of appeals, however, we submit that in none of these situations could anyone reasonably or legitimately expect that the indirect consequences of the governmental action give him a personal right to dispute, and be heard with respect to, the merits of the action—in effect, a right vicariously to assert and defend the rights of others.

Although this Court has never been presented directly with this kind of claim of vicarious constitutional rights, that concept is contrary not only to ordinary expectations but also to established principles.[40] The Third Circuit's approach makes the *nature* of the affected interest largely irrelevant and makes the weight of the interest (*i.e.*, the consequences of the governmental action) controlling; it places no discernible limit on the liberty and property interests entitled to the procedural protections of the Due Process Clause. Most governmental actions reverberate through a complex economy. Decisions denying utilities the right to build new plants could be viewed as affecting the interests of consumers in contracting for electricity and thus requiring hearings for them. Other decisions could affect indirectly some other personal but constitutionally recognized interest (*e.g.*, the right to work, marry, bear children, travel, live in a location of one's choice, and so forth). But this Court rejected in *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, the argument that all important governmental decisions implicate the procedural protections of the Due Process Clause. See also *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (when a legislative type of decision broadcasts its effects to many people, there is no need for each to be offered a hearing).

For those reasons, when some governmental action is directed against and primarily affects the protected property interests of one party, and only indirectly affects the property interests of another, that person

[40] It is settled, for example, that a person can litigate about the constitutional rights of third parties only in unusual circumstances. See *Craig* v. *Boren*, 429 U.S. 190, 192-197 (1976).

ordinarily has no legitimate and mutual expectation of entitlement in the matter. Congress could, of course, create such a vicarious entitlement, but there is no such indication with respect to Medicare or Medicaid; indeed, the statutory and regulatory scheme manifests quite the contrary intent. As we have noted, 42 U.S.C. 1396a(a)(23) entitles eligible patients to obtain medical assistance only from "any institution * * * qualified to perform the service." The statutes and regulations set forth in detail the standards and procedures by which HEW and the responsible state agencies are to determine whether nursing homes and other providers are qualified to perform covered services and receive payment. Nothing in the statutes and regulations suggests an intent to give patients a right to dispute and be heard with respect to those determinations by HEW and the state agencies. In short, the only legitimate claims of entitlement of patients are: (1) to participate in the program if they meet the statutory age, health, and income qualifications, and (2) if they are admitted to the programs, to receive care from any of the providers then determined by HEW and the states to be qualified. They have no personal entitlement to dispute the determination that someone is unqualified to be a provider, and they have no entitlement to any particular outcome in contests about qualifications.

Moore v. *Johnson*, 582 F.2d 1228 (9th Cir. 1978), supports this approach. The court rejected a contention by patients in a veterans hospital that they were entitled to personal hearings before the Veterans Administration could order them to be transferred on the ground that the hospital did not satisfy statutory standards. The court held that the residents had no

constitutionally protected property interest in receiving care at a particular facility. The court stated (582 F.2d at 1233–1234) that:

> To the extent that they believed that the Administrator *must* furnish domiciliary care and vocational training benefits *to them* at *specific facilities in Los Angeles* their expectations * * * are mere 'unilateral expectations.' As such, they are not property interests.

Similarly, in *Caton Ridge Nursing Home* v. *Califano*, No. 78–1290 (4th Cir. Feb. 26, 1979), the court held that a Medicaid patient had no right to a hearing on the termination of her home's participation when the home was removed from the program because of its failure to correct structural and other defects constituting a fire hazard.[41] See also *Nicobatz* v. *Weinberger*, [1974] Medicare and Medicaid Guide (CCH) ¶27,427; *Cook* v. *Bates*, [1978 Transfer Binder] Medicare and Medicaid Guide (CCH) ¶29,410.[42]

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[41] *Klein* held that the district court's opinion in *Caton Ridge* (later affirmed by the Fourth Circuit) was inapposite because there is a distinction between services rendered to the patients (about which they "could be expected to contribute relevant information") and matters such as structural defects, about which they could not. 586 F.2d at 260 n.17. It seems doubtful whether most matters could be classified so readily; but in any event there is no basis for concluding, either from the statute or general principles, that the existence of a constitutionally protected property interest depends on the amount of "relevant information" a person can contribute to a governmental decision. The nature of the entitlement—not the "usefulness" of a hearing—is what marks the existence of a property interest.

[42] Several other decisions have dealt with the procedural rights of nursing homes with respect to terminations. The Second and Third Circuits have held that nursing homes have no right to a pre-termination hearing, and that the post-termination hearing provided by the statutes and regulations are adequate. *Case* v. *Weinberger*, 523 F.2d 602 (2d Cir. 1975);

C. *The Rationale of the Concurring Opinion Does Not Support the Conclusion That Medicare and Medicaid Recipients Have A Property Interest In the Continued Program Participation of The Nursing Home In Which They Reside*

The concurring opinion written by Judge Adams in this case (Pet. App. 30a–60a) offers a justification for the application of the Due Process Clause that is quite distinct from the rationale offered by the opinion for the court in *Klein*. Because the concurring opinion here apparently states the dispositive considerations for the judges who cast the deciding votes,[43] we now address Judge Adams's approach to the identification of property interests.

Town Court Nursing Center, Inc. v. *Beal*, 586 F.2d 266 (3d Cir. 1978) (en banc) ("*Nursing Home*"). The Seventh Circuit has held that a nursing home is entitled to a pre-termination hearing. *Hathaway* v. *Mathews*, 546 F.2d 227 (1976). Because Town Court did not seek review of the decision in *Nursing Home*, that question is not presented here.

[43] It is quite difficult to identify any opinion for the court in any of the cases. Judge Van Dusen's opinion in *Klein* was signed by Judges Aldisert, Adams, Gibbons, Weis, and Higginbotham: It was adopted as the rationale for the disposition in this case, announced by Judge Aldisert (the announcement was joined by Judges Gibbons, Weis, and Higginbotham). But Judge Adams stated (Pet. App. 37a–39a, 41a & n.20) that the rationale of Judge Van Dusen's opinion in *Klein* is not persuasive; he is joined in this view by Judges Gibbons, Weis, and Garth, two of whom joined both Judge Van Dusen's opinion in *Klein* and Judge Aldisert's opinion here. (Judge Garth dissented in *Klein* on mootness grounds.) Because three judges (Chief Judge Seitz and Judges Rosenn and Hunter) concluded that patients had no property interest in the renewal of the home's provider agreement, the rationale of Judge Adam's "concurring" opinion may well be the Third Circuit's holding. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

The concurring opinion advances three related arguments in support of the conclusion that patients have a constitutionally protected property interest in this case. First, it argues that even if no statutory and regulatory provision, considered alone, establishes a property interest, the statutes and regulations considered together "paint * * * [a] landscape of a 'legitimate claim of entitlement' that Medicaid beneficiaries can assert" (Pet. App. 39a). Second, it argues that the practical consequences of a termination for "physically weakened, economically disadvantaged" patients "are relevant and persuasive on the issue of whether the statute and regulations should be interpreted to create a protected property interest in *this* case" (*id.* at 45a). Third, it argues that the scope of federal transfer payment programs, and their substantial effects on society, should make courts more receptive to due process claims relating to "those new forms of property" (*id.* at 46a). These arguments reflect a philosophical position that is fundamentally at odds with controlling decisions of this Court.

First, the position that "property" interests can be found not only in the terms of the applicable statutes and regulations but also in their "landscape" (or perhaps "flavor") is quite wrong. "Landscapes" do not confer claims of entitlement turning on particular facts; they do not set up mutual expectations. Large social welfare programs like Medicare and Medicaid have precise terms set by Congress; courts cannot properly enlarge the substantive rights of beneficiaries by drawing out of "landscapes" rules that Congress did not put there. The provisions of the statutes and regulations are drafted by Congress and the administrators with painstaking care; they are continu-

ally revised and amended in light of experience and changing conditions. Accordingly, in this context particularly, courts should hew closely to the precise terms of the statutes and regulations in determining the content of legitimate and mutual claims of entitlement. The suggestion that the "landscape" is full of unspecified property rights amounts to an approach that creates property rights solely on the basis of unilateral expectations.[44] And unilateral expectations are not "property." See *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, slip op. 4–5; *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577.

The same principle applies to the concurring opinion's third point; *i.e.*, that courts should be "particularly receptive to claims arising from federal transfer programs." Congress knows how to establish entitlements giving rise to "property." It need only set up a substantive rule of decision, making personal entitlements turn on determinable facts. See *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 332. There is no basis or need for courts to impose procedural requirements on such programs beyond those required by statute or by the identification of substantive entitlements.

The concurring opinions' second argument—that the practical consequences of moving from one nursing

[44] It is possible that Judge Adams' reference to the statutory "landscape" was meant to refer to possible ambiguities in the statutory language concerning the rights conferred by the statute, and that he was engaging in the ordinary judicial function of interpreting vague or ambiguous statutory terms. But the concurring opinion does not support that view of the "landscape" approach, since it does not attempt to resolve statutory ambiguities but instead seems to find property rights from the flavor or gestalt of the statute.

home to another are relevant and persuasive considerations in determining the existence of constitutionally protected interests—squarely conflicts with this Court's decisions and overlooks a number of considerations pertinent to the administration of the Medicare and Medicaid programs. This Court has consistently rejected the proposition that the weight of the effect of governmental action on a person's interests, however substantial, is relevant in determining whether that interest is "liberty" or "property." Once it is determined that liberty or property is at stake, the weight of the interest may be very important in determining what process is due (*e.g.*, *Mathews* v. *Eldridge*, *supra*), but it is not relevant to the threshold inquiry. See pages 23–26, *supra*.

We fully recognize that the termination of a nursing home's program participation can have a substantial effect on Medicare and Medicaid patients residing in the home. That is one of the reasons why current HEW and state survey procedures require observation of and interviews with patients in certification surveys.[45] Indeed, because of its concern about the consequences of its certification and termination decisions on many patients, HEW plans to initiate rulemaking in the near future to consider what further procedures may be appropriate for patient participation in the termination process. Such participation, established by a rulemaker with the benefit of the views of interested parties throughout the nation, may well be desirable as a matter of administrative policy; that fact, however, does not suggest the appropriateness of imposing procedural requirements on the responsible agencies as a matter of

[45] See page 6 and note 17, *supra*.

constitutional law. Quite the contrary is true, because there are a number of considerations, other than the effects of terminations on certain patients, that are relevant to that policy determination and that were overlooked by the concurring opinion.

First, although termination of a home may have a significant consequences for some patients, the statute requires HEW to consider the interests of all the home's Medicare and Medicaid patients in receiving decent and acceptable medical care. The termination or non-renewal of a home's participation in the programs is the principal sanction available to HEW and the states for ensuring that patients for whom federal and state funds are expended will receive the level and quality of care that Congress and the states intended. The importance of that sanction in furthering the statutory purpose is reflected in the fact that provider agreements must be renewed each year following an annual survey and recertification. Rigid requirements that all covered patients be given notice and opportunity for hearings prior to termination (and presumably to judicial review following exhaustion of the administrative procedures) might substantially weaken the effectiveness of that sanction, to the general and significant detriment of all of the patients to the home.[46] Hearings and review inevitably would delay any decision. The delay in this

[46] For example, if HEW and the states seek to terminate a home because of significant deficiencies in medical staffing and care, requiring them to continue funding until some patients have exhausted an opportunity, administratively and judicially, to express their views that the level of staffing and care is adequate (or preferable to transfer) would substantially lessen the incentives of many homes promptly to correct the deficiencies. And the vindication of the procedural rights of the few may be small solace to the many receiving inadequate care in the interim.

case exceeds two years. Indeed, in *Nursing Home* the court of appeals cited these problems as support for its holding that Town Court itself had no right to an evidentiary hearing prior to the effective date of the termination. 586 F.2d at 278.

A second relevant consideration also was identified in *Nursing Home:* any pre-termination hearing requirement might undermine the strong "public interest in preserving scarce financial and administrative resources" (586 F.2d at 278). In that case the court concluded that "the cost of providing pre-termination hearings would be substantial." It may be assumed that the cost would be even more substantial if hearings must be provided not just to the home but also to all of its patients. See also *Califano* v. *Boles*, No. 78–808 (June 27, 1977), slip op. 2–5. Moreover, because the statutes and existing procedures already require that patients be interviewed during the survey process that leads to termination (see note 17, *supra*), and already provide nursing homes with a right to post-termination hearings, a rulemaker considering the appropriateness of enhancing patient participation in the decisionmaking process might well consider whether avoidance of duplication and waste of administrative resources warranted additional and substantially duplicative procedures.

Third, apart from the adverse consequences of such a rigid requirement, there seems little basis for the assumption of the court of appeals (see Pet. App. 54a; *Klein* v. *Califano*, *supra*, 586 F.2d at 258) that such a requirement would provide a significant incremental contribution to the correctness of the administrative decision. Many of the statutory and regulatory standards defining a qualified nursing facility pertain to matters about which the patients have little or no qualifica-

tion to express an informed view—*e.g.*, the compliance of the physical structure with safety and fire code requirements, the adequacy of staff training, the competence of physician care, and so on. That is the principal reason why the Fourth Circuit in *Caton Ridge Nursing Home* v. *Califano*, *supra*, held that a Medicaid patient had no right to a hearing on the termination of her home, which was terminated because of its failure to correct structural and other defects constituting a fire hazard. But even on matters about which the patients have more direct information, it may be doubted whether an absolute pre-termination hearing requirement would provide a substantial incremental contribution to the accuracy of the decisionmaking process.

Finally, as the dissenting opinion concluded (Pet. App. 65a), the survey and termination process provides ample opportunity for the party most directly concerned with certification and termination—the home itself—to consult with its patients and present information in support of the position that termination is not warranted. As this case illustrates, nursing homes have that opportunity prior to termination even though they are not entitled to a formal evidentiary hearing until after the effective date of termination.

In sum, the reliance of the concurring judges on the practical effects of termination on patients, as a basis for finding a constitutionally protected property interest, not only is contrary to this Court's decisions but also overlooks significant countervailing policy considerations. All of the policy considerations would be relevant to a rulemaker fashioning procedures dealing with patient participation in the survey and termination process, and will undoubtedly be considered carefully by HEW in the rulemaking it plans to initiate. But they

are not and should not be relevant in determining whether patients have a constitutional right to a hearing before a particular home's contract is not renewed.[47]

[47] As we have remarked (see note 26, *supra*), the court of appeals did not specify what process is "due," except to hold that the hearing must be offered to patients before the nursing home's eligibility is terminated. Pet. App. 29a-30a; *Klein* v. *Califano*, *supra*, 586 F.2d at 260-261. The question presented by the petition subsumes the question whether this requirement that the hearing come before, rather than after, the termination is correct.

We believe that there are substantial difficulties with the court's conclusion, even if it is right that the patients' "property" interests are at stake. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343, emphasized "the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." In most cases, as in *Eldridge* and *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), all constitutional requirements can be satisfied by a hearing after the initial action has taken place.

Eldridge concluded that courts should inquire into the private interest at stake, the risk of an erroneous deprivation, the value of additional safeguards, and the government's interest in avoiding excessive procedural entanglements, in deciding what process is "due" for particular kinds of decisions. 424 U.S. at 335. These considerations suggest that a prior oral hearing is not consititutionally necessary. First, the termination of a particular provider does not affect any patient's right to receive benefits; it means only that the patient will be required to move from one place to another. The patient's interest is therefore less substantial than the beneficiary's interest in cases such as *Eldridge*, in which the government terminated the person's own right to benefits. Second, additional safeguards may be of little value in avoiding erroneous terminations. The nursing homes have the greatest interest in avoiding termination; they may be expected to contest the decision and to assemble relevant information. Survey teams already interview patients and take their views into account in recommending whether the home should be terminated. The additional information that could be contributed by patients on subjects such as fire safety, the qualifications of the nursing staff, and the nutritive content of the food would be slight. Moreover, questions concerning the qualifica-

tions of the staff, the safety of the building, and so on, are amenable to accurate resolution after a combination of on-site inspections and review of documentary evidence, which the regulations now require. It is unlikely that oral hearings would add greatly to what the inspections and documents reveal. See also *Califano* v. *Yamasaki*, *supra*, slip op. 13; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343–347; *Richardson* v. *Perales*, 402 U.S. 389, 404 (1971), all of which hold that the Constitution does not require prior oral hearings when the subject is susceptible of documentary proof. Third, there is a significant governmental interest in avoiding prior oral hearings. Such hearings, as we discuss in the text, would delay the effectiveness of remedial action and thus diminish the ability of federal and state administrators to induce nursing homes to improve their conditions. The government also has a strong interest in minimizing the number of hearings: there is little to be gained by offering 199 hearings on the termination of Town Court (one for each of the 198 patients, and one for Town Court itself). One hearing per decision ought to be enough.

We have not addressed this question at greater length, however, because the court of appeals did not define the content of the due process requirements beyond specifying that the hearings should occur before the termination. The practical effects of pre-termination hearings are strongly influenced by their procedural content. There are dramatic differences among the kinds of prior hearing required by *Goss* v. *Lopez*, 419 U.S. 565 (1975) (brief, informal consultation), by *Parham* v. *J.L.*, No. 75–1690 (June 20, 1979) (the informed decision of a medical professional), and by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (full adversarial hearing with counsel and cross-examination). We therefore believe that, if the Court holds that the patients have a "property" interest in the continued status of a particular home as a provider, it may be most appropriate to remand the case for further consideration of what process is due, and whether that process must take place before a home may be terminated from participation in the program.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1979

APPENDIX

42 U.S.C. 1395 provides in pertinent part:

(j) Skilled nursing facility

The term "skilled nursing facility" means (except for purposes of subsection (a)(2) of this section) an institution (or a distinct part of an institution) which has in effect a transfer agreement (meeting the requirements of subsection *(l)* of this section) with one or more hospitals having agreements in effect under section 1395cc of this title and which—

* * * * *

(9) in the case of an institution in any State in which State or applicable local law provides for the licensing of institutions of this nature, (A) is licensed pursuant to such law, or (B) is approved, by the agency of such State or locality responsible for licensing institutions of this nature, as meeting the standards established for such licensing;

* * * * *

(15)[1] meets such other conditions relating to the health and safety of individuals who are furnished services in such institution or relating to the physical facilities thereof as the Secretary may find necessary.* * *

1395cc provides in pertinent part:

(a)(1) Any provider of services (except a fund designated for purposes of section 1395f(g) and section 1395n(e) of this title) shall be qualified to participate under this subchapter and shall be eligible for payments under this subchapter if it files with the Secretary an agreement—

(A) not to [etc]* * *

* * * * *

An agreement under this paragraph with a skilled nursing facility shall be for a term of not exceeding

12 months, except that the Secretary may extend such term for a period not exceeding 2 months, where the health and safety of patients will not be jeopardized thereby, if he finds that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services by such facility or if he finds it impracticable within such 12-month period to determine whether such facility is complying with the provisions of this subchapter and regulations thereunder.

* * * * *

(b) Termination of agreement

An agreement with the Secretary under this section may be terminated (and in the case of a skilled nursing facility, prior to the end of the term specified in subsection (a)(1) of this section)—

(1) by the provider of services at such time and upon such notice to the Secretary and the public as may be provided in regulations, except that notice of more than 6 months shall not be required, or

(2) by the Secretary at such time and upon such reasonable notice to the provider of services and the public as may be specified in regulations, but only after the Secretary has determined (A) that such provider of services is not complying substantially with the provisions of such agreement, or with the provisions of this subchapter and regulations thereunder, or (B) that such provider of services no longer substantially meets the applicable provisions of section 1395x of this title,* * *

42 U.S.C. 1395ff provides:

(a) Entitlement to and amount of benefits

The determination of whether an individual is entitled to benefits under part A or part B, and the

determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

(b) Appeal by individuals

(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

(A) Whether he meets the conditions of section 426 or section 426a of this title, or

(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of this subchapter, or section 1395i-2 of this title, or section 1819, or

(C) the amount of benefits under part A (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(2) Notwithstanding the provisions of subparagraph (C) of paragraph (1) of this subsection, a hearing shall not be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $100; nor shall judicial review be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $1,000.

(c) Appeal by institutions or agencies

Any institution or agency dissatisfied with any determination by the Secretary that it is not a provider of services, or with any determination described in section 1395cc(b)(2) of this title, shall be entitled to a hearing thereon by the Secretary (after reasonable notice and opportunity for hearing) to the same extent as is provided in section 405(b) of this title, and to judicial review of the

Secretary's final decision after such hearing as is provided in section 405(g) of this title.

42 U.S.C. 1396a provides in pertinent part:

(a) Contents

A State plan for medical assistance must—

* * * * *

(23) Except in the case of Puerto Rico, the Virgin Islands, and Guam, provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services; * * *.

* * * * *

(28) provide that any skilled nursing facility receiving payments under such plan must satisfy all of the requirements contained in section 1395x(j) of this title, except that the exclusion contained therein with respect to institutions which are primarily for the care and treatment of mental diseases and tuberculosis shall not apply for purposes of this subchapter;

42 U.S.C. 1396; provides:

(a) Whenever the Secretary certifies an institution in a State to be qualified as a skilled nursing facility under subchapter XVIII of this chapter, such institution shall be deemed to meet the standards for certification as a skilled nursing facility for purposes of section 1396a(a)(28) of this title.

(b) The Secretary shall notify the State agency administering the medical assistance plan of his ap-

proval or disapproval of any institution which has applied for certification by him as a qualified skilled nursing facility.

Supreme Court, U.S.
FILED
AUG 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare, Pennsylvania, Petitioner

v.

TOWN COURT NURSING CENTER, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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INDEX.

Page

I. Constitutional Provisions, Statutes, and Regulations Involved 1

II. Questions Presented 2

III. Counter-Statement of the Case 3

A. The Patients 3

B. Town Court 4

C. Procedural History 8

D. Statutory Scheme 17

IV. Summary of Argument 20

V. Argument 22

A. Petitioner May Not Obtain Review When She Failed to Appeal or Cross-Appeal From the Judgment of the District Court Granting Relief Against Her 22

B. HEW May Not Obtain Review of the Judgment Below 25

1. Patients' Complaint Sought No Relief Against HEW 25

2. HEW Is Barred From Seeking Review of the Judgment Below by Reason of Its Failure to File a Petition for Certiorari 25

C. The Decertification of Town Court From the Pennsylvania Medical Assistance Program and the Consequent Transfer of Patients to Another Facility Without Affording Process to the Patients Amounts to Deprivation of Their Due Process Rights to Life, Liberty, and Property 25

1. Introduction 25

INDEX (Continued).

Page

2. Patients Will Be Deprived of Their Property Rights by Decertification of Town Court and the Transfer of Patients to Another Facility ... 26
   (a) Patients Are Third Party Beneficiaries of the Provider Agreement Between Town Court and the Pennsylvania Department of Public Welfare 26
   (b) The Statutory and Regulatory Scheme Grants Patients a Legitimate Claim of Entitlement to Remain at Town Court 30
3. The Patients Are Deprived of Life and Liberty by Decertification of Town Court and Their Transfer to Another Facility 35
4. Patient Input Prior to Decertification Will Not Thwart Federal Policy and Will Reduce the Risk of an Erroneous Deprivation of Life, Liberty, and Property 40

D. Transfer Trauma Incident to Removal of the Patients to Another Facility Results in Reduction in Assistance Requiring That Notice and a Hearing Be Given the Patients 46

VI. Conclusion 48

Appendix:

Involuntary Terminations of Skilled Nursing Facilities and Intermediate Care Facilities, 1974-1978 A1

History of Social Security Administration Appeals From Involuntary Terminations of Skilled Nursing Facilities and Intermediate Care Facilities, 1968-1979 ..... A2

United States Constitution:
   Amendment V A4
   Amendment XIV A4

INDEX (Continued).

Page

42 U. S. C. § 1396a A5

45 C. F. R. § 205.10(a)(5) A6

HEW, *Interpretive Guidelines and Survey Procedures for the Application of the Conditions of Participation for Skilled Nursing Facilities* [42 C. F. R. § 405.1121(k)(4)] A7

Pa. Stat. Ann. tit. 62:
   § 401 ..... A9
   § 402 ..... A9
   § 441.1 ..... A9
   § 442.1 ..... A10
   § 443.1 ..... A10

28 Pa. Code:
   § 201.29 ..... A12
   § 201.30 ..... A13
   § 201.34 ..... A14
   § 201.35 ..... A18

DPW-OMP-MA Manual 9424.6 ..... A21

Commonwealth of Pennsylvania, Department of Public Welfare, Medical Assistance Program, Skilled Nursing Home Care Agreement A24

TABLE OF CITATIONS.

Cases: Page

Arnett v. Kennedy, 416 U. S. 134 (1974) 34
Berry v. First Healthcare Corp., Inc., [1977-1978 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶ 28,693, (D. N. H. 1977) 29
Bishop v. Wood, 426 U. S. 341 (1976) 36
Blair v. Anderson, 10 Del. 94, 325 A. 2d 94 (1974) 28
Board of Regents v. Roth, 408 U. S. 564 (1972) 31, 36, 37
Bolling v. Sharpe, 347 U. S. 497 (1954) 37
Book's Estate, 297 Pa. 543, 147 A. 608 (1929) 27
Bracco v. Lackner, 462 F. Supp. 436 (N. D. Cal. 1978) 34, 35, 38, 45, 48
Brennan v. Arnheim & Neely, Inc., 410 U. S. 512 (1973) 20, 23
Brotherhood of Railroad Trainmen v. Virginia, 374 U. S. 1 (1964) 40
Brown v. Commonwealth of Pennsylvania, Department of Welfare, — Pa. Commw. Ct. —, 401 A. 2d 616 (1979) 3, 38, 48
Burchette v. Dumpson, 387 F. Supp. 812 (E. D. N. Y. 1974) . 44
Califano v. Yamasaki, 61 L. Ed. 2d 176 (1979) 44
Case v. Weinberger, 523 F. 2d 602 (2d Cir. 1975) 40
Caton Ridge Nursing Home, Inc. v. Califano, 596 F. 2d 608 (4th Cir. 1979) 40
Commonwealth v. Great American Indemnity Co., 312 Pa. 183, 167 A. 793 (1933) 27
Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932) 32
Feld v. Berger, 424 F. Supp. 1356 (S. D. N. Y. 1976) 35, 43
Friedman v. Berger, 547 F. 2d 724 (2d Cir. 1976) 43
Fuentes v. Shevin, 407 U. S. 67 (1972) 30
Fuzie v. Manor Care, Inc., 461 F. Supp. 689 (N. D. Ohio 1977) 20, 28, 29
Goldberg v. Kelly, 397 U. S. 254 (1970) 20, 30
Goss v. Lopez, 419 U. S. 565 (1975) 36

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 99 S. Ct. 2100 (1979) 31, 33, 42
Greenwald v. Whalen, 78 Civ. 2765—CSH (S. D. N. Y., Jan. 26, 1979) 38
Greyhound Corp. v. Mt. Hood Stages, Inc., 98 S. Ct. 2370 (1978) 23
Griswold v. Connecticut, 381 U. S. 479 (1965) 37
Ingraham v. Wright, 430 U. S. 651 (1977) 39
In re North Penn Convalescent Residence, Inc., Office of Appeals, HEW, Social Security Administration, Docket No. PS-157, Feb. 16, 1979 7
Ivy Nursing Home, Inc. v. Califano, [1977-1978 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶ 28,470 (W. D. Pa. 1977), *appeal dismissed by stipulation*, No. 77-2176 (3d Cir., Oct. 3, 1977) 35
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123 (1951) 39
Kane v. Parry, 41 N. Y. 2d 1051, 396 N. Y. S. 2d 182 (1977) 24
Kent v. Dulles, 357 U. S. 116 (1958) 37
Klein v. Califano, 586 F. 2d 250 (3d Cir. 1978) 25
Klein v. Mathews, 430 F. Supp. 1005 (D. N. J. 1977) 37, 38, 47
Kurtz v. Pittsburgh, 346 Pa. 362, 31 A. 2d 257 (1943) 32
Letulle v. Scofield, 308 U. S. 415 (1940) 25
Lieberman v. Howard Johnson's, Inc. (No. 1), 68 Pa. D. & C. 2d 129 (1973) 27
Lynch v. Household Finance Corp., 405 U. S. 538 (1972) ... 36
Mabel Dunn Rest Home, Inc. v. Weinberger, 9 Clearinghouse Review 200 (D. R. I., June 5, 1975) 35
Mackey v. Montrym, 47 U. S. L. W. 4798 (June 26, 1979) .. 42
Mathews v. Eldridge, 424 U. S. 319 (1976) 39, 41, 42, 45, 46
Maxwell v. Wyman, 478 F. 2d 1326 (2d Cir. 1973) 25
Memorial Hospital v. Maricopa County, 415 U. S. 250 (1974) 33
Memphis Light, Gas and Water Division v. Craft, 436 U. S. 1 (1978) 34

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Meyer v. Nebraska, 262 U. S. 390 (1923) 21, 36
Montana Deaconess Hosp. v. Department of Social and Rehabilitation Services, 167 Mt. 383, 538 P. 2d 1021 (1975) 24
Montana Power Co. v. Public Utility District No. 2 of Grant County, Washington, 587 F. 2d 1019 (9th Cir. 1978) ... 22
Moore v. Johnson, 582 F. 2d 1228 (9th Cir. 1978) 40
NAACP v. Button, 371 U. S. 415 (1963) 39
Nicobatz v. Weinberger, [1974-1976 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶ 27,427 (C. D. Cal. 1974) 35
Olmstead v. United States, 277 U. S. 438 (1928) 48
Paramount Convalescent Center, Inc. v. Department of Health Care Services, 15 Cal. 3d 489, 125 Cal. Rptr. 265, 542 P. 2d (1975), *cert. denied*, 425 U. S. 992 (1976) 41
Perry v. Sindermann, 408 U. S. 593 (1972) 31, 33, 34
Richardson v. Perales, 402 U. S. 389 (1971) 41
Roberson v. Wood, 464 F. Supp. 983 (E. D. Ill. 1979) 29, 35
Ryerson v. United States, 312 U. S. 405 (1941) 20, 25
Shelton v. Tucker, 364 U. S. 478 (1960) 39
Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394 (1872) .. 36
Smith v. Organization of Foster Families For Equality and Reform, 431 U. S. 816 (1977) 40
Spires v. Hanover Fire Insurance Co., 364 Pa. 52, 70 A. 2d 828 (1950) 20, 27, 28
Stitt v. Manor Care, Inc., MEDICARE AND MEDICAID GUIDE (CCH) New Developments ¶ 29,409 (N. D. Ohio 1978) 35
Stone v. Egeler, 377 F. Supp. 115 (W. D. Mich. 1973) 39
Stretch v. Weinberger, 495 F. 2d 639 (3d Cir. 1974) 44
Thomas v. Collins, 323 U. S. 516 (1945) 40
Town Court Nursing Center, Inc. v. Beal, 586 F. 2d 266 (3d Cir. 1978) 8, 24
United States v. Commonwealth of Pennsylvania, 394 F. Supp. 261 (M. D. Pa. 1975), *aff'd* 533 F. 2d 107 (3d Cir. 1976) 12, 25

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Cases (Continued): Page

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United States v. Laub, 385 U. S. 475 (1967) 37
United States v. New York Telephone Co., 434 U. S. 159 (1977) 23
White v. Mathews, 434 F. Supp. 1252 (D. Conn. 1976), *aff'd* 559 F. 2d 852 (2d Cir. 1977), *cert. denied sub nom.* Califano v. White, 435 U. S. 908 (1978) 41
Williams v. Paxson Coal Co., 346 Pa. 468, 31 A. 2d 69 (1943) 30
Wise v. Lipscomb, 98 S. Ct. 2493 (1978) 23
Yaretsky v. Blum, 592 F. 2d 65 (2d Cir. 1979) 44

Constitution, Statutes and Regulations:

United States Constitution:
Amendment V 1, 9, 26
Amendment XIV 1, 9, 26
Social Security Act:
42 U. S. C. § 1395 (1970) *et seq.* 4
42 U. S. C. § 1395x(j) (1970) 3
42 U. S. C. § 1396 (1970) *et seq.* 3
42 U. S. C. § 1396a(19) (1970) 1, 33
42 C. F. R. § 405.1101 *et seq.* (1977) 3
42 C. F. R. § 405.1121(k)(4) (1977) 18, 33
45 C. F. R. § 205.10(a)(5) (1977) 1, 21, 46, 47
HEW, *Interpretive Guidelines and Survey Procedures for the Application of the Conditions of Participation for Skilled Nursing Facilities* 18, 39
HEW, Technical Assistance Memorandum AoA-TA-75-1 (Feb. 19, 1975) 38

TABLE OF CITATIONS (Continued).

Constitution, Statutes and Regulations (Continued): Page

Pa. Stat. Ann. tit. 62:
- § 207 (1968) 17
- § 401 (1968) 1, 32
- § 402 (1979-1980 Pocket Part) 1
- § 441.1 (1979-1980 Pocket Part) 1, 3
- § 442.1 (1979-1980 Pocket Part) 1
- § 443.1 (1979-1980 Pocket Part) 1

28 Pa. Code:
- § 201.1 et seq. 17
- § 201.29 1
- § 201.29(e) 33
- § 201.30 1
- § 201.30(b) 33
- § 201.34 1
- § 201.34(a) 17
- § 201.34(c) 17
- § 201.34(g) 17
- § 201.34(h) 18, 29, 33
- § 201.34(i) 17
- § 201.34(w) 18
- § 201.34(z) 18
- § 201.35 1
- § 201.35(d) 17
- § 201.35(e) 18

3 Pa. Bulletin 76, 1105 (1973) 44

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Authorities: Page

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RESTATEMENT OF CONTRACTS §§ 133, 147 ..... 27, 30

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16 C. Wright, A. Miller, E. Cooper & E. Gressman, FEDERAL PRACTICE AND PROCEDURE (1977) 23

Zweig and Csank, Mortality Fluctuations Among Chronically Ill Medical Geriatric Patients As An Indicator of Stress Before And After Relocation, 24 JOURNAL OF AMERICAN GERIATRICS SOCIETY 264 (1976) 37

I. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The following constitutional provisions, statutes, and regulations are involved, the relevant portions of which are reproduced in the appendix to the brief:

United States Constitution, Amendment V
United States Constitution, Amendment XIV
42 U. S. C. § 1396a(19) (1970)
45 C. F. R. § 205.10(a)(5) (1977)
Pa. Stat. Ann. tit. 62, § 401 (1968)
Pa. Stat. Ann. tit. 62, § 402 (1979-1980 Pocket Part)
Pa. Stat. Ann. tit. 62, § 441.1 (1979-1980 Pocket Part)
Pa. Stat. Ann. tit. 62, § 442.1 (1979-1980 Pocket Part)
Pa. Stat. Ann. tit. 62, § 443.1 (1979-1980 Pocket Part)
28 Pa. Code § 201.29
28 Pa. Code § 201.30
28 Pa. Code § 201.34
28 Pa. Code § 201.35

Other relevant statutory and regulatory provisions are set forth in the appendix of the briefs of Petitioner and the Secretary of Health, Education, and Welfare. In addition, other regulatory material pertinent to the questions presented is set forth in the appendix to this brief.

II. QUESTIONS PRESENTED.

1. May Petitioner seek review of a judgment of a court of appeals when she failed to appeal or cross-appeal from the judgment of the district court and when she expressly took no position on the merits before the court of appeals?

2. May the United States Department of Health, Education, and Welfare ("HEW") seek review of a judgment of a court of appeals when Respondents have never sought relief against HEW and HEW failed to file or join in a petition for certiorari?

3. Do skilled nursing facility patients receiving benefits under the Pennsylvania Medical Assistance Program have a constitutional or statutory right to be heard with respect to and prior to termination of the facility from participation in the program and transfer of the patients from that facility?

III. COUNTER-STATEMENT OF THE CASE.

A. The Patients.

Respondents Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei, and Nancy Truitt (referred to hereinafter collectively as "the Patients") are patients at Town Court Nursing Center, Inc. ("Town Court"), a skilled nursing facility [1] in Philadelphia, Pennsylvania. Each is sufficiently indigent to qualify for benefits under the Pennsylvania Medical Assistance Program.[2] Each is also in need of round-the-clock nursing care requiring placement in a skilled nursing facility.

Emma Cooper has been a patient at Town Court since July 16, 1976; Mary Crawford, since September 23, 1975;

1. Nursing homes are classified by the type and degree of care provided to their patients. The classifications are skilled nursing facility, intermediate care facility, and domiciliary care facility. Of the three, the most intensive medical care is provided by skilled care facilities. As recently described, "[s]killed care patients generally fall into two categories: the short-term convalescent recovering from serious accident, operation or illness, or the long-term chronically ill. Examples of skilled care services include administration of medication with known dangerous side effects; restrictive procedures such as bowel training and physical therapy; "tube" maintenance; tracheostomy maintenance; and the administration of oxygen." *Brown v. Commonwealth of Pennsylvania, Department of Public Welfare*, — Pa. Commw. Ct. —, 401 A. 2d 616, 617 (1979), citing DPW-OMP-MA Manual 9424.3 and 9424.32. The DPW-OMP-MA Manual is an unpublished compilation of regulations of the Pennsylvania Medical Assistance (MA) Program issued by the Office of Medical Programs (OMP) of the Pennsylvania Department of Public Welfare (DPW). See also DPW-OMP-MA Manual 9424.6; 42 U. S. C. § 1395x(j) (1970); 42 C. F. R. § 405.1101 *et seq.* (1977).

2. The Pennsylvania Medical Assistance Program, Pa. Stat. Ann. tit. 62, § 441.1 *et seq.*, is often referred to as "Medicaid," the popular name of Title XIX of the Social Security Act, 42 U. S. C. § 1396 (1970) *et seq.*, by which the federal government reimburses states for part of the expense of their medical assistance programs. Although the Pennsylvania program and Medicaid parallel each other to a large extent, Pennsylvania has distinct regulations.

Hazel Kemp, since October 18, 1973; Arnold L. Phillips, since October 18, 1973; Delphine Taddei, since October 16, 1976; and Nancy Truitt, since February 28, 1977. (A. 10a-11a) Together, they have lived almost twenty-five years at Town Court and they continue to receive care at Town Court to this day. The average age of patients at Town Court is the mid-seventies. (A. 199a)

B. Town Court.

The Patients have no direct interest in the history of the relationship between the governmental agencies and Town Court. A review of that relationship, however, is necessary to rebut the apparent contention of Petitioner, Helen B. O'Bannon, Secretary of Public Welfare of Pennsylvania ("Petitioner"), and the Secretary of Health, Education, and Welfare ("HEW") that the recognition *vel non* of Patients' constitutional or statutory rights depends somehow upon Town Court's alleged past misdeeds.

Town Court was a certified Medicaid provider from the beginning of the Pennsylvania Medical Assistance Program in 1967. It was decertified in 1974, although it continued to be licensed under state law. Town Court appealed that decertification, but no administrative hearing has ever been held on the appeal.[3]

In 1975, Town Court applied for recertification which was granted in May 1976 for both the Medicare and Medicaid programs.[4] Two months later, after being notified

3. *In re Town Court Nursing Center, Inc.*, Office of Appeals, HEW, Social Security Administration, Docket No. PS-94. Town Court has challenged the failure to provide an administrative hearing as a violation of its due process rights. That action is pending in the United States District Court for the Eastern District of Pennsylvania on cross-motions for summary judgment under caption *Town Court Nursing Center, Inc. v. Califano*, Civil Action No. 77-4065.

4. Medicare, 42 U. S. C. § 1395 (1970) *et seq.*, is a federally-administered health insurance program which provides, *inter alia*,

by the local district attorney of a complaint he had received (A. 33a), HEW conducted its own survey of Town Court which produced radically different conclusions from those of the Pennsylvania Department of Health in April 1976, which had resulted in the recommendation for certification accepted by HEW. The findings differed greatly; *e.g.*, the federal surveyors found deficiencies purportedly present at the time of the state survey but which were not found by the state surveyors. (A. 65a, 67a, 70a, 84a, 90a, 91a) Nevertheless, Town Court's certification was continued without qualification.

When state surveyors next inspected Town Court in November 1976 and March 1977, they allegedly found substantial deficiencies. However, none of these alleged deficiencies involved violations of the *Life Safety Code*.[5] Reports of these surveys were the basis for the May 20, 1977, Pennsylvania Medical Assistance Program decertification which generated the case under review by the Court.[6] Town Court again appealed from the decertification, but no hearing examiner has been assigned to hear

4. (Cont'd.)
skilled nursing services to its insureds. Pursuant to state and federal regulation, a skilled nursing facility may be certified under either Medicare (in which case the provider certification process is solely an HEW decision), or Medicaid (in which case the provider certification process is a state decision subject to federal review), or both (in which case the certification process is based upon state recommendation but subject to federal approval or revocation). Town Court has been jointly certified under both Medicare and Medicaid.

5. This Code was promulgated by the National Fire Protection Association, setting forth structural requirements for nursing home safety.

6. On May 17, 1977, HEW terminated Town Court from the Medicare program. (A. 294a) Petitioner's termination of Town Court from the Pennsylvania Medical Assistance Program (A. 291a) then followed pursuant to state and federal regulations.

the merits of the controversy, nor has a hearing been scheduled.[7]

This second decertification decision was ten days after the issuance of a presentment by a special state investigating grand jury. (A. 551a)[8] Town Court was indicted and in September 1977 a plea bargain was entered into and approved by the court which resulted in: (1) a nolo contendere plea being entered on seven summary offenses of violation of state regulations in 1975 and 1976, as to which a fine was imposed; and (2) consent to the retention, for a period of two years, of a consultant selected by the Pennsylvania Department of Health. Charges of reckless endangerment of life, referred to in the HEW Brief at 9 n. 22, were dismissed by the court.

Since that time, other state inspections of Town Court have been made, resulting in the following action:

1. *June 1977*—Inspection by Pennsylvania Department of Health for relicensure—provisional license to operate skilled nursing facility issued; (A. 534a-45a)[9]

2. *November 1977*—Inspection by Pennsylvania Department of Health for relicensure and Medicare and Medicaid participation—provisional license to operate skilled nursing facility issued and, in March 1978, Petitioner recommended to HEW that Town Court be recertified as a provider under Medicaid; [10]

3. *April 1978*—Inspection by Pennsylvania Department of Health for relicensure—full one-year license to operate skilled nursing facility issued;

4. *April 1979*—Inspection by Pennsylvania Department of Health for relicensure and Title VI status [11]—full one-year license to operate skilled nursing facility issued.

Although the Patients are fully aware of the allegations against Town Court, they have filed this action

7. There were two appeals taken. The first was taken from the Medicare decertification and is to be heard by the Office of Hearings and Appeals of the Social Security Administration. The Medicare decertification appeals process is described in Butler, *Medicare Appeals Procedures: A Constitutional Analysis*, 70 Nw. U. L. Rev. 139, 146-47, 166-67 (1975). See also appendix to brief, A1-A3. The second was taken from the Pennsylvania Medical Assistance Program decertification. The latter appeal was heard and continued indefinitely by a Pennsylvania administrative law judge pending federal action. The review in the Pennsylvania Medical Assistance Program appeal is limited to the question of the existence of Medicare decertification; the merits of the HEW decertification decision are not considered. (A. 292a)

8. An objection to the introduction of this presentment was raised in the district court. The court admitted the presentment "for what it is worth." (A. 521a) The issue was again raised before the court of appeals which doubted "the relevance of the presentment to the issues raised . . . ," but nevertheless did ". . . not believe any prejudice resulted from the reception of the presentment into evidence." 586 F. 2d at 271 n. 4.

9. A recent decision by a Social Security Administration administrative law judge holds that HEW may decertify a nursing home based only upon conditions existing on the date of decertification, not those found at a survey months prior to that date. *In re North Penn Convalescent Residence, Inc.*, Office of Appeals, HEW, Social Security Administration, Docket No. PS-157, Feb. 16, 1979. Thus, in view of the results of the June 1977 survey, there is a significant basis for dispute with respect to decertification (effective June 18, 1977) within Petitioner's own survey reports. See also medical review follow-up survey performed by Pennsylvania Department of Public Welfare on May 9, 10 and 11, 1977. (A. 380a-86a, and especially A. 384a-85a)

10. HEW has not acted upon this recommendation. Petitioner acknowledges Town Court's continuing licensure under state law. Petitioner's Brief at 8 n. 10.

11. Title VI, 42 U. S. C. § 801 (1970) *et seq.*, refers to a federally-reimbursed state program for rehabilitation and related services to the aged, blind, and disabled.

because they are satisfied with the care they are receiving at Town Court and wish to remain there.

C. Procedural History.

On July 20, 1977, the Patients [12] instituted an action against Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania (Secretary Beal and his successors are referred to as "Petitioner").[13] The action was filed as a class action on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court.

In their complaint, the Patients alleged that they were medically indigent under Pennsylvania law; that they were in chronic need of the services provided by Town Court; that such services were not available elsewhere at other skilled care facilities in Philadelphia; that if Town Court is compelled to close or otherwise cease providing skilled care services to them, they will suffer immediate and irreparable psychological and physical harm; and that the action of Petitioner in terminating Town Court violated their right to a hearing under 45 C. F. R. § 205.10 and the

12. Throughout these proceedings both in the district court and in the court of appeals, the Patients were represented by separate counsel although counsel for Town Court took the laboring oar at hearings and argument. Inasmuch as the Patients continue as parties here and Town Court does not, these parties' activities below, even though joint, are ascribed to the Patients.

13. This action is set forth in count II of the complaint (A. 7a) filed by both Town Court and the Patients. The remaining counts of the complaint set forth causes of action brought by Town Court only, both against Petitioner and against HEW. These other counts have no direct bearing upon the disposition of this matter. *Town Court Nursing Center, Inc. v. Beal*, 586 F. 2d 266 (3d Cir. 1978).

Fifth and Fourteenth Amendments to the Constitution of the United States. (A. 7a-13a) [14]

The Patients sought to enjoin Petitioner, prior to a final determination of all appeals by Town Court from the termination of its Medicare and Medicaid certifications, from (1) terminating those certifications; (2) removing from Town Court those patients eligible for benefits under those programs; (3) discontinuing or withholding payments to Town Court for their care; and (4) prohibiting placement of other Medicare and Medicaid patients at Town Court.

The Patients obtained a temporary restraining order from the district court. The order prohibited termination or withholding of payments to Town Court for care of Medicaid beneficiaries.[15]

14. The Patients never received notice from Petitioner of the termination of Town Court and have been provided no opportunity to participate in the termination process. Although Petitioner and HEW contend that the HEW manual establishing survey procedures would appear to require patient interviews by state surveyors (Petitioner's Brief at 22 n. 20; HEW Brief at 6 n. 17), that contention was not raised in the district court. Further, no such interviews occurred in the surveys of November 1976 and March 1977, as the survey reports in the record illustrate. (See A. 63a, 109a, 400a, 424a) In all the reports in the record, only two patients were interviewed in the course of a federal survey conducted from July 19 through 23, 1976 (A. 73a, 87a), and other patients, perhaps as many as ten, were interviewed during the course of a state survey of March 19 and 20, 1974. (A. 40a, 41a, 50a, 51a, 57a) These interviews consisted of bedside conversations in which patients were asked about the food they received, staff handling, and alleged verbal abuse.

15. Such relief was based, *inter alia*, upon the affidavit of Maurice Linden, M.D., a Philadelphia psychiatrist. Dr. Linden stated: "Transfer from such a facility may cause these patients to suffer substantial psychological and physical harm and, in certain circumstances, could increase the possibility of serious illness and even death. Unless an individual patient is clearly shown to be able to withstand the trauma of being moved to another facility, I would not favor such a transfer from Town Court." (A. 16a, 17a) Dr. Linden later testified at the preliminary injunction hearing. (A. 251a-54a)

A hearing was then held on the Patients' motion for a preliminary injunction. At that hearing, the Patients presented seven witnesses, including five independent experts. These experts, whose testimony was uncontradicted,[16] included: (1) a professor of health care administration; (2) a director of a county department of health and hospital superintendent and former director of the New Jersey Medical Assistance Program; (3) a licensed nursing home administrator and registered nurse; (4) a registered pharmacist and former chief of pharmaceutical services for the New Jersey Medical Assistance Program; and (5) a board-certified psychiatrist with extensive experience in geriatric service. Each testified to inspections he made of Town Court in June and July 1976. Each testified that no danger to the health and safety of the patients existed at Town Court. (A. 221a, 227a, 248a, 253a, 259a) The experts also submitted voluminous reports of their observations of patient care at Town Court and analyses of the last state survey prior to decertification. (A. 300a, 318a, 343a, 357a, 365a, 373a)

Dr. Maurice Linden, one of the experts who testified, is a board-certified psychiatrist in practice for thirty-two years, a clinical professor of psychiatry at Thomas Jefferson University, and chief of the geriatric psychiatric outpatient service for the Jefferson Community Mental Health Center. He testified as follows (A. 252a-53a):

> Q. Now, sir, you have observed many of the patients at the Town Court Nursing Home?
>
> A. Oh, yes.
>
> Q. Would you care to give us an estimate of how many you may have observed during the course of your visits there.

16. At no time during the course of these proceedings did either Petitioner or HEW present any medical or other expert testimony of any kind.

> A. In the past three years the total number of people that I have seen there at the Home I suppose they would number in the 300, 200.
>
> Q. Now, sir, assuming that these patients had to be removed within a short period of time such as 30 days or 60 days, would there be any effect on these patients from the mental point of view—forgetting the physical aspects of it in your opinion—and, if so, will you give His Honor the reasons therefor.
>
> A. Yes. My opinion in this instance is studied. It is based on experience in the field of gerontology and geriatrics, the field I have been in since 1946.
>
> There is copious evidence in the literature that the transfer of dependent elderly patients out of an institution of health care, nursing home, for example, tends to be on a high mortality rate. Some get sicker and some die.
>
> Q. In your opinion would the removal of any of these patients endanger their lives or aggravate their mental or health conditions?
>
> A. On the basis of that finding, I think we could safely say yes.
>
> Q. In your opinion is there any danger to the health and safety of the patients that are presently residents or patients at Town Court Nursing Home?
>
> A. I have not found reason to believe that. I think there is no such danger to their health or safety at the present time.

Finally, uncontradicted testimony[17] also established that "[t]here are just thousands of people who are waiting

17. HEW presented only one witness who attempted to explain the basis for the decision to decertify Town Court. The court sustained an objection to such testimony because the witness was not involved in the decision-making process at the time the determination was made. (A. 281a)

for placement of [in] skilled care facilities in Philadelphia. There are many, many facilities in Philadelphia about to be closed because of life safety code problems." (A. 267a) [18]

Upon completion of the hearing, the district court issued a bench order (A. 288a-89a): [19]

> Specifically on the basis of the evidence which has been presented, it is my feeling that the harm which would be done to the patients as well as to the corporate plaintiff by the cessation of funding would be devastating and irreparable whereas there can be serious question as to the jurisdiction of this Court with respect to the merits of the controversy. I believe this Court does have jurisdiction for the limited purpose of maintaining the status quo during the period when the administrative action on the application for reconsideration is undergoing its routine processing and completion.
>
> Since it is clear on the record that the continuation of patients in that nursing home during that period would not be inconsistent with the continued health and welfare of the patients—in other words, none of the alleged complaints bear on any serious safety or health hazards—under all those circumstances the following Order is entered:
>
> That the Temporary Restraining Order heretofore entered shall remain in effect pending completion of administrative action on the pending application for reconsideration and until the defendants give to the plaintiffs at least five days' written notice of their intention again to terminate funding.
>
> It is understood that during this period the funding will not be curtailed or cut off and that the defendants will not systematically or otherwise intentionally remove patients from the home except in cases where that is the patient's own voluntary choice or in cases of medical necessity. In short, there will be [no] attempt to simply transfer patients for the sake of putting them in some other place than this.
>
> And it is understood that there will be no prohibition during this interim period against placement of additional patients at the home.

18. See *United States v. Commonwealth of Pennsylvania*, 394 F. Supp. 261, 262 (M. D. Pa. 1975), *aff'd* 533 F. 2d 107 (3d Cir. 1976).

19. The Order was preceded by the statement that "it is my understanding that the Order which is about to be entered, while not consented to by any of the defendants, probably is not terribly inconsistent with their views as to an appropriate disposition." (A. 288a)

Town Court's request for reconsideration by HEW was denied (A. 140a), whereupon the Patients moved for an extension and renewal of the preliminary injunction. At the hearing on the motion for extension, one of the experts who testified at the earlier hearing submitted a further report of an inspection of Town Court in August 1977. His conclusion was the same: no patient's life or safety would be endangered to any extent by remaining at Town Court. (A. 525a)

Following that hearing, the district court issued a second bench opinion and order (A. 531a-33a):

> I may state that the primary purpose of the Court in this proceeding is apparently not capable of being realized.
>
> Let me comment upon the evidence which has been presented both at the previous hearing and today. I am absolutely convinced that nobody in the administrative end of HEW who is involved in this

case so far as a party here has the faintest idea of what they are doing.

I am persuaded that somebody got all upset with very good justification about complaints of conditions which existed back in 1975, at the latest, or early in 1976, and about financial irregularities. It is absolutely clear to me that anybody in his right mind would conclude that the patients at Town Court Nursing Home are better off there than they would be anywhere else in the foreseeable future.

I am also satisfied that the evidence which has been presented this morning by the first witness [20] sounded more like a memorized recitation than testimony about facts. It was full of sweeping conclusions and gobbledygook, which makes no sense. The ultimate conclusion was simply the alleged reconsideration of this case was a conclusion that there was adequate documentation or sufficient documentation to substantiate the issue.

It is obvious to me that the taxpayers would have saved a lot of money if instead of all the time that has been wasted in this proceeding and somebody has simply gone over and looked the place over. It is quite apparent to me that people are much more interested in sustaining previously stated positions, in dotting I's and crossing T's, than they are in actually carrying out sensibly the very beneficial program having to do with nursing homes.

Having said all that, I nevertheless reluctantly conclude that in view of the position taken by the Government, a position which I frankly do not understand and never will, there is nothing that the Court can do about it.

20. Claudette V. Campbell, Regional Officer's Consultant for the Office of Long-Term Care, HEW, Region III. She was HEW's only witness. (A. 501a-19a)

If the administrative bureaucrats persist in being blind to facts, if they persist in looking at documents instead of institutions, if they persist in looking at regulations instead of facts and events, there is nothing the Court can do about it.

It is obvious to me that the outcome of the administrative review is a foregone conclusion. But it is equally obvious to me this is a matter in the control within the administrative agency and not within the control of the Court.

Therefore, it seems to me the long and short of it is that the bureaucrats will wind up with having to stew in their own juice.

I have attempted to make it possible for them to review this matter and arrive at a solution which will be beneficial to the patients involved. That has not borne fruit. It will be up to them to cope with the needs of these patients in some fashion, which I hope will bring them to a realization of the problem.

* * *

If the powers that be in the bureaucracy wish to move the patients out, that is their privilege. They are going to pay for them while they are there, and it will be up to them to arrange alternative locations for them.

All of this is denied and the preliminary injunction, of course, is without prejudice to a reconsideration of the matter by the appropriate officials if there can be anyone prevailed upon to have enough enlightenment to look at the current situation and make a current judgment and not look at papers and make a

bureaucratic judgment based upon what is on paper and what may have existed in the past.

Later the same day the district court issued a written order requiring only that payments to Town Court be continued for patients remaining there and staying its effect for ten days to permit the Patients to seek a further stay from the court of appeals. (A. 118a)

Patients filed a notice of appeal (A. 120a) and a motion for injunction pending appeal with the court of appeals. (A. 124a) The court of appeals granted Patients' motion, enjoining defendants both from removing patients from Town Court and from prohibiting placement of patients at Town Court. (A. 142a)

HEW filed a cross-appeal from that portion of the district court's order which required continued payment on account of Medicare and Medicaid patients remaining at Town Court, but Petitioner filed no cross-appeal. In the brief in the court of appeals, Petitioner described herself as a "stakeholder" whose "position should not be inferred to be either for or against the position of either the federal agency [HEW] or the nursing facility."

The court of appeals, *en banc*, concluded that the Patients have a constitutional right to a hearing prior to termination of a nursing home's participation in the Medicaid program. (A. 144a) The cause was remanded for further proceedings to determine "what procedures will satisfy the constitutional rights of" the Patients to such a hearing. (A. 150a) The court of appeals also affirmed that portion of the district court order from which HEW had cross-appealed (A. 150a), thereby requiring it not to withhold payments to Town Court.

Petitioner thereafter filed a petition for certiorari. HEW did not file its own petition for certiorari and did not join in or support the petition which was filed.

D. Statutory Scheme.

Patients are recipients of benefits under the Pennsylvania Medical Assistance Program. Established in 1967 and administered by the Pennsylvania Department of Public Welfare, that program is the latest form of a comprehensive scheme in Pennsylvania to provide medical care to the indigent.[21] Assistance is provided to categorically and medically needy persons, *i.e.*, those who are financially unable to afford necessary medical care.

As part of its detailed regulations for skilled and intermediate care facilities, 28 Pa. Code § 201.1 *et seq.*, Pennsylvania law provides that each facility shall establish policies in writing regarding the rights of patients [28 Pa. Code § 201.34(a); see also 28 Pa. Code § 213.2(d)]; that these policies shall be available to "staff, patients, consumer groups and interested public . . ." [*id.* at § 201.34(c)]; and that a patient shall be "afforded the opportunity to participate in the planning of his medical treatment." [*Id.* at § 201.34(g)] It further provides that "[t]he patient is encouraged and assisted throughout his period of stay to exercise his rights as a patient and as a citizen and to this end may voice grievances and recommend changes in policies and services to facility staff or to outside representatives of his choice or both." [*Id.* at § 201.34(i)][22] Each facility must adopt and post in a

21. For details of the historical evolution of the present program, see Historical Note to Pa. Stat. Ann. tit. 62, § 207 (1968).

22. Pennsylvania also has adopted detailed requirements permitting recognized community organizations and representatives of community legal service programs to visit patients. *Id.* at § 201.35(c). "At no time may the facility restrict the right of the patient to have legal representation." *Id.* at § 201.35(d). The purpose of such visits may include informing patients of their rights and entitlement and "assisting patients in assert[ing] their legal rights . . ." individually or on a group basis, so as to extend to patients the full enjoyment of their rights. *Id.* at § 201.35(e).

highly conspicuous place [*id.* at § 201.34(w) and .34 (z)], *inter alia*, the following information:

> The patient shall be transferred or discharged only for medical reasons or for his welfare or that of other patients or for nonpayment of his stay. . . . *Id.* at § 201.34(h).[23]

A certification system has been established in order to qualify a nursing home to furnish care under Medicaid. The standard for certification under Medicare and Medicaid and the standards for licensing in Pennsylvania are "99.9 percent similar . . . [s]o that if a license were given one should assume and could presume that the standards for licensing were met and, therefore, the standards for Medicare and Medicaid were substantially in compliance at that particular time." (A. 526a) For this reason, the

23. Nearly identical language is found in 42 C. F. R. § 405.1121 (k)(4) (1977), for which HEW's interpretative guidelines define the terms "transfer," "medical reasons" and "welfare" as follows:

> 1. The term "transfer" applies to the movement of a patient from one location to another within a facility, as well as movement to another facility.
>
> 2. "Medical reasons" for transfer or discharge are based on the patient's needs and are determined and documented by a physician. Movement may be required to provide a different level of care.
>
> 3. "Welfare" of a patient or that of other patients refers to *their social or emotional well-being*. This is a complex concept in that assessment can vary with each individual patient, facility, and surveyor. *An example of moving a patient* for his welfare is *to facilitate visits by relatives and friends*. A patient might also be transferred or discharged because his behavior poses a continuing threat to himself (*i.e.*, suicidal) or to the well-being of other patients (*e.g.*, his behavior is incompatible with their needs and rights).

HEW, *Interpretative Guidelines and Survey Procedures for the Application of the Conditions of Participation for Skilled Nursing Facilities* at 21 (emphasis added).

Pennsylvania Department of Health often conducts licensure and certification surveys simultaneously.[24]

24. The November 1977 survey of Town Court, see p. 7 *supra*, was a combined relicensure-Medicare-Medicaid survey.

IV. SUMMARY OF ARGUMENT.

Petitioner neither appealed nor cross-appealed from that part of the district court order which required her to continue payments to Town Court for Medicaid patients and took no position either for or against the Patients or HEW in the court of appeals, where she described herself as a "stakeholder," indifferent to the outcome. Thus, not only does Petitioner have no standing to seek review by the Court, she has also failed to preserve any issues for such review. *Brennan v. Arnheim & Neely, Inc.*, 410 U. S. 512, 516, 521 (1973).

The Patients have not sought relief against HEW; it was not a party to their one-count claim against Petitioner In addition, HEW neither filed a petition for certiorari on its own behalf nor joined in or filed a brief in support of the petition which was filed and therefore cannot attack the judgment. *Ryerson v. United States*, 312 U. S. 405, 408 (1941).

On the merits, the Patients have property rights in their continued residence and care at Town Court. These property rights arise from the provider agreement between Petitioner and Town Court—a contract of which the Patients are third party beneficiaries. *Spires v. Hanover Fire Insurance Co.*, 364 Pa. 52, 70 A. 2d 828 (1950); *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689 (N. D. Ohio 1977). In less traditional but equally realistic terms, property rights subject to constitutional protection may be found in the Patients' legitimate claims of entitlement to the benefits of social welfare legislation enacted for the benefit of a class of which they are members. *Goldberg v. Kelly*, 397 U. S. 254 (1970).

The Patients, if they are relocated to another skilled care facility, will likely suffer the effects of "transfer trauma," an increased possibility of untimely death or serious illness which results from the transfer of elderly, infirm persons from one location to another. This exposure to risk of illness or even death poses a threat to life or liberty of constitutional dimensions. *Meyer v. Nebraska*, 262 U. S. 390 (1923). In addition, this harm causes the Patients a reduction in assistance entitling them to a statutorily granted pretermination notice and hearing. 45 C. F. R. § 205.10(a)(5) (1977).

Since decertification of Town Court will deprive the Patients of property rights, will expose them to loss of life or liberty and will result in a reduction of their assistance, they are entitled to a hearing before Town Court is decertified. Allowing the Patients this process will reduce the risk of an erroneous deprivation of their rights, and will not unduly burden the administration of the Medicaid program.

V. ARGUMENT.

A. Petitioner May Not Obtain Review When She Failed to Appeal or Cross-Appeal From the Judgment of the District Court Granting Relief Against Her.

Petitioner seeks review of a judgment of the court of appeals. That judgment affirmed the judgment of the district court to the extent that it granted relief to the Patients against Petitioner. The court of appeals also vacated and remanded the case for further proceedings regarding the relief which the district court denied the Patients.

The district court granted injunctive relief against Petitioner requiring her to continue payments to Town Court on account of Medical Assistance patients so long as they remained at Town Court, even though Petitioner had determined Town Court to be an unqualified provider. Petitioner filed no appeal or cross-appeal from that judgment which surely entailed a decision, albeit a preliminary one, on the merits.[25]

The failure of Petitioner to appeal meant that she had no objection to the merits of the district court order. Moreover, her conduct in filing a brief in the court of appeals in which she characterized herself as a "stakeholder" and took no position "for or against" the legal or factual issues raised by the Patients and by HEW further confirmed her disinterest in the proceedings in the court below.[26] Had Petitioner attacked the underlying merits of

25. The order did not run against HEW inasmuch as there were no Medicare patients suing, and indeed, there were none then residing in Town Court. (A. 210a)

26. *See Montana Power Co. v. Public Utility District No. 2 of Grant County, Washington*, 587 F. 2d 1019, 1022 n. 1 (9th Cir. 1978) [when, at oral argument, counsel took no position on issue,

the district court order in the court of appeals, she would have been attempting to expand the relief she had been granted. In the absence of an appeal or cross-appeal, Petitioner was and is barred from doing so.

As the Court noted in *United States v. New York Telephone Co.*, 434 U. S. 159, 166 n. 8 (1977), "the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." HEW, however, cites briefs filed in that case to support the proposition that any argument may be raised by a party which prevailed below although such attack might give the party greater relief in future suits than it accepted in the present one. HEW Brief at 18 n. 27. However, in *Brennan v. Arnheim & Neely, Inc.*, 410 U. S. 512, 516, 521 (1973), the Court rejected, as an impermissible collateral attack, arguments made by a prevailing party which, if sustained, would have invalidated the relief granted against that party below and from which it had not filed a cross-petition. See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, FEDERAL PRACTICE AND PROCEDURE § 4004, at 520-21 (1977). See also *Wise v. Lipscomb*, 98 S. Ct. 2493, 2501 (1978). A similar situation is presented here where, as the court of appeals noted: "This appeal, however, is from a preliminary proceeding in the district court. Upon remand, therefore, [Petitioner] will be free to seek a modification of the district court's order

26. (Cont'd.)
the lack of position construed as equivalent of a waiver and opposing party assumed to be correct]. Likewise, Petitioner took no position and made no statements of any kind at the district court hearing at which the order reviewed by the court of appeals was issued. *Cf. Greyhound Corp. v. Mt. Hood Stages, Inc.*, 98 S. Ct. 2370, 2376 (1978) [petition to intervene filed by United States in ICC proceeding, which took no position on the merits, sought no relief and charged no party with wrongdoing, of no effect in tolling the Clayton Act statute of limitations for subsequent private action].

to conform to the judgment of this court with respect to Town Court's rights." 586 F. 2d at 279.

A related question, regarded as "close" by HEW (HEW Brief at 21), is, assuming Petitioner does have the right to seek review, whether she properly preserved the arguments now presented to the Court. Inasmuch as Petitioner did not prevail below, and raised no argument and took no position below, the only means by which she may contend to have preserved the issues for review is by the actions of HEW before the court of appeals.

However, Petitioner, and not HEW, is constitutionally and statutorily responsible for the administration of the Pennsylvania Medical Assistance Program from which the Patients receive benefits.[27] For this reason, the separate interests of Petitioner could not have been protected by HEW, as raised by the Patients in their reply brief before the court of appeals. Petitioner's obligations arise primarily under Pennsylvania constitutional and statutory law. Petitioner's singular failure to discuss Pennsylvania law either before the Court or the court of appeals exemplifies her misconception of her role in this litigation. The court of appeals commented: "[w]e believe [Petitioner] misconceives [her] position in this litigation. . . . Since [Petitioner] has not cross-appealed, the propriety of the order that the district court entered against [her] is not before us." 586 F. 2d at 279.

In face of the express indifference of Petitioner in the court of appeals, no issues have been preserved for review by the Court.

27. The sole responsibility of the state to administer its medical assistance program is well recognized. *Kane v. Parry*, 41 N. Y. 2d 1051, 396 N. Y. S. 2d 182 (1977); *Montana Deaconess Hosp. v. Department of Social and Rehabilitation Services*, 167 Mt. 383, 538 P. 2d 1021 (1975). *Cf. Town Court Nursing Center, Inc. v. Beal*, 586 F. 2d 266, 279 (3d Cir. 1978).

B. HEW May Not Obtain Review of the Judgment Below.

1. Patients' Complaint Sought No Relief Against HEW.

Patients' complaint consists of a single count against Petitioner only, not HEW. (A. 10a-11a) HEW may not seek review of a decision in an action which has not sought and does not now seek relief against it.[28]

2. HEW Is Barred From Seeking Review of the Judgment Below by Reason of Its Failure to File a Petition for Certiorari.

HEW did not file its own petition for certiorari, and did not seek to join in or file a brief in support of the petition which was filed.[29] Therefore, HEW may not attack the judgment below. *Ryerson v. United States*, 312 U. S. 405, 408 (1941); *Letulle v. Scofield*, 308 U. S. 415, 421 (1940).[30]

C. Decertification of Town Court From the Pennsylvania Medical Assistance Program and the Consequent Transfer of Patients to Another Facility Without Affording Process to the Patients Amounts to a Deprivation of Their Due Process Rights to Life, Liberty, and Property.

1. Introduction.

In the past decade the Court has established criteria for evaluating the due process claims of the Patients. A

28. It is possible that there is an independent federal obligation to reimburse the state for monies expended in the Pennsylvania Medical Assistance Program. *Maxwell v. Wyman*, 478 F. 2d 1326 (2d Cir. 1973); *United States v. Commonwealth of Pennsylvania*, 394 F. Supp. 261, 263 (M. D. Pa. 1975).

29. HEW also had an opportunity to file a petition for certiorari in a companion case, *Klein v. Califano*, 586 F. 2d 250 (3d Cir. 1978), but likewise chose not to do so.

30. Further, even if HEW could now pursue review, it must fail because Petitioner failed to preserve her rights in the court of appeals.

review of that precedent leads compellingly to the conclusion—as recognized by a majority of the members of the Third Circuit Court of Appeals—that patients of a skilled care nursing facility are entitled to a hearing prior to termination of that nursing facility as a provider under the Medicaid program and ultimate transfer of the patients to another facility.

The Patients' right to pre-termination process is based upon their right not to be deprived of "life, liberty, or property, without due process of law . . ." as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Each of these protected interests—life, liberty, and property—provides a distinct basis for recognizing those due process rights.

2. Patients Will Be Deprived of Their Property Rights by Decertification of Town Court and the Transfer of Patients to Another Facility.

The Patients have a property interest in the right to remain in their skilled care nursing facility. This property right has two sources. The provider agreement covering their care vests the Patients with contractual rights as third party beneficiaries of the agreement. Further, the federal and state statutory scheme and the common law in Pennsylvania which provide for the Patients' care create benefits for them from which a legitimate claim to remain in the facility arises.

(a) Patients Are Third Party Beneficiaries of the Provider Agreement Between Town Court and the Pennsylvania Department of Public Welfare.

Town Court has on an annual basis entered into a provider agreement with Pennsylvania's Department of

Public Welfare for the care of patients in a skilled care nursing home under the Pennsylvania Medical Assistance Program.[31] The main—if not sole—objective of the agreement is to provide the Patients with adequate skilled nursing facilities, care, services, and treatment, thus making them third party beneficiaries of the contract.

Pennsylvania has long recognized the rights of third parties to assert rights under contracts made for their benefit.[32] In the leading case, *Spires v. Hanover Fire Insurance Co.*, 364 Pa. 52, 70 A. 2d 828 (1950), the Pennsylvania Supreme Court declared that the rights of a third party to a contract could be established by showing that the parties had contemplated that the third party would be benefited and had indicated that intention in the contract. The Court noted, however, that it was not necessary that a particular third party beneficiary be specifically or individually designated in the contract. 364 Pa. at 57 n.*, 70 A. 2d at 831 n.*.[33]

31. Certification under the Pennsylvania Medical Assistance Program makes possible the execution of a "provider agreement" between a health care provider and the Pennsylvania Department of Public Welfare. The agreement, titled "Commonwealth of Pennsylvania Department of Public Welfare Medical Assistance Program Skilled Nursing Home Care Agreement," is contained in the DPW-OMP-MA Manual at Appendix VIII promulgated by the Pennsylvania Department of Welfare. 3 Pa. Bulletin 1725 (1973). The form of the agreement is appended to this brief. (A24)

32. See, *e.g.*, *Book's Estate*, 297 Pa. 543, 147 A. 608 (1929), where the Pennsylvania Supreme Court recognized the rights of children, not parties to a contract, to enforce its terms providing for their maintenance and support. The provisions of the RESTATEMENT OF CONTRACTS relating to the rights of third party beneficiaries have been adopted as the law of Pennsylvania. *Commonwealth v. Great American Indemnity Co.*, 312 Pa. 183, 167 A. 793 (1933).

33. State trial courts in Pennsylvania have broadly interpreted contracts with governmental agencies as giving rights to third parties. See, *e.g.*, *Lieberman v. Howard Johnson's, Inc. (No. 1)*, 68 Pa. D. & C. 2d 129 (1973), a class action on behalf of all users of the Pennsylvania Turnpike. Plaintiffs sought to enforce provisions

Lower courts, applying rules identical to that enunciated in *Spires*, have found nursing home patients to be third party beneficiaries of a state's Medicaid provider agreement. In *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689 (N. D. Ohio 1977), Ohio's Medicaid recipients residing at a private nursing home brought an action to enforce patient care standards under Ohio law. After reviewing the regulations in question, the court found sufficient intent to confer rights in patients as third party beneficiaries of the provider agreement. The court held at 697-98:

> Ohio law has long recognized that "a third person for whose benefit a promise has been made by another may maintain an action thereon at law in his own name," 11 O. Jur. 2d, Contracts § 176, at 425; see cases cited *id.* at n. 1. The State of Ohio, having elected to participate under Title XIX and to receive federal funds, is obligated to provide Medicaid services to qualified recipients in a manner consistent with federal law [citations omitted]. Defendant Manor Care's obligations under the state and federal law and regulations are contractual. Insofar as the provisions of the federal regulations found at 20 C. F. R. § 405.1121(k)(4) [now 42 C. F. R.] and 45 C. F. R. § 249.12(a)(1)(ii)(B)(4) [now 42 C. F. R. § 442.311 (4) (1978)] and of § 306.4 of the Ohio Medicaid Handbook reflect a duty owed to Ohio Medicaid patients by the state and by the participating providers of their care, enforceable by them within the administrative structure of the program, therefore, such recipients may maintain an action under a provider's agreement in accordance with the law of Ohio.[34]

See also *Roberson v. Wood*, 464 F. Supp. 983, 987 (E. D. Ill. 1979) [motions to dismiss denied where allegations that plaintiff-nursing home residents were third party beneficiaries of a provider agreement under the Illinois Medicaid program between nursing home and Illinois Department of Public Aid]; and *Berry v. First Healthcare Corp., Inc.*, [1977-1978 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶28,693 (D. N. H. 1977) [motions to dismiss denied as to counts in complaint which alleged that nursing home residents were third party beneficiaries of provider agreement under the New Hampshire Medicaid program between nursing home and State of New Hampshire].[35]

33. (Cont'd.)
contained in the leases between the Pennsylvania Turnpike Commission and the service station operators regulating the prices charged to the public. The court found members of the class to be third party beneficiaries of the leases, stating: "If the thrust of a contract between a governmental agency and a private party is for the benefit of individual members of the public, then a third-party benefit is created which can be enforced by a member of the public in the event of a breach by the private party." *Id.* at 140. Courts in other states have given like recognition to the contractual rights of third parties. See, *e.g.*, *Blair v. Anderson*, 10 Del. 94, 325 A. 2d 94 (1974), where a federal prisoner incarcerated in a state correctional facility brought action against the warden for negligence in permitting an assault on him by fellow prisoners. The Supreme Court of Delaware, in recognition of the statutory requirement that the Federal Bureau of Prisons provide, *inter alia*, "[s]afekeeping, care and subsistence", and "protection" for a prisoner [18 U. S. C. § 4042 (1970)], found the prisoner to be a third party beneficiary of the contract between Delaware and the United States which incorporated this statutory duty.

34. The statutory and regulatory provisions in question in *Fuzie* are virtually identical to those *sub judice*. *Compare* 28 Pa. Code § 201.34(h) *with* section 306.4 of the Ohio Medicaid Handbook which provides: "[Each Medicaid patient] is transferred or discharged only for medical reasons, or for his/her welfare or that of other patients, or for non-payment for his stay (except as prohibited by Title XIX Program); and given reasonable sure orderly transfer or discharge [sic]." *Fuzie*, 461 F. Supp. at 697.

35. HEW recognized that "legitimate claims of entitlement" may be based upon several sources including contract (HEW Brief at 25) but failed to address this issue. Had HEW done so, it would have quickly realized the want of analogy which it has attempted to draw between the Patients' rights and those of em-

The termination of the provider agreement would require the Patients to be transferred to another facility, thereby disrupting the care, services, and treatment required by the provider agreement. As the intent of both parties to this agreement is to benefit the Patients, the latter have legitimate contractual rights which are affected by the decision to terminate.[36] Process must therefore be afforded them prior to that decision.[37]

(b) The Statutory and Regulatory Scheme Grants Patients a Legitimate Claim of Entitlement to Remain at Town Court.

The Patients also have property rights which evolve from the statutory and regulatory scheme involved. In *Goldberg v. Kelly*, 397 U. S. 254 (1970), the Court developed an entitlement concept which required that process be granted to a welfare recipient prior to termination of his benefits. In reviewing the state's welfare statute, the Court found in its grant of benefits property interests sufficient to require observance of procedural due process:

35. (Cont'd.)
ployees of government contractors or other persons similarly situated. (HEW Brief at 15, 24 n. 32, 30) The latter could only be viewed as incidental beneficiaries possessing no property rights. See RESTATEMENT OF CONTRACTS §§ 133, 147; *see also Williams v. Paxson Coal Co.*, 346 Pa. 468, 31 A. 2d 69 (1943).

36. The Court has consistently held that due process must be afforded prior to a deprivation by the state of one's contractual rights. See, *e.g.*, *Perry v. Sindermann*, 408 U. S. 593 (1972) [possible implied contractual right to renewal of teaching contract gave rise to due process rights]; and *Fuentes v. Shevin*, 407 U. S. 67 (1972) [replevin of goods purchased under conditional sales contract implicated due process despite the fact the owner lacked full legal title].

37. Commentators have recognized that nursing home patients may be third party beneficiaries of provider agreements under the Medicaid program. Brown, *An Appraisal of the Nursing Home Enforcement Process*, 17 ARIZONA L. REV. 304, 352 (1975), and Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate*, 65 GEORGETOWN L. J. 691, 715 (1977).

> [Welfare benefits] are a matter of statutory entitlement for persons qualified to receive them.[8] Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'.

8 It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. 397 U. S. at 262.

The Court subsequently had an opportunity to review the entitlement concept, which was explained by Justice Stewart:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[38]

Thus, the emphasis of the Court was the need to find some property right grounded in state law which could vest a legitimate claim of entitlement in the party seeking due process. Such a right for the Patients exists in Penn-

38. *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577 (1972). See also *Perry v. Sindermann*, 408 U. S. 593, 603 (1972) (Burger, C. J., concurring); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S. Ct. 2100, 2103 (1979).

sylvania which has a long history, dating back to 1899, of providing free medical care to indigent persons. In 1923, Pennsylvania first adopted a program of providing free institutional medical care to indigent persons by means of payment to private institutions, including nursing homes.[39] In *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 76-77, 161 A. 697, 710 (1932), the Pennsylvania Supreme Court declared: "We again hold that the support of the poor . . . is and has always been a direct charge on the body politic for its own preservation and protection . . . . To hold that the State may not under the [Pennsylvania] Constitution now aid such people, even though it be a governmental duty, would be to deny to the State the right to perform not only an important, but, at this time, a most pressing governmental function." In *Kurtz v. Pittsburgh*, 346 Pa. 362, 380, 31 A. 2d 257, 264 (1943), the Pennsylvania Supreme Court similarly observed that "[i]t is always the duty of the state acting through appropriate agencies to take care of persons who are without means of support."

Skilled nursing care for the indigent has traditionally been one of the types of health care services recognized and funded by Pennsylvania. The program has been modified many times and in 1967 was replaced by Article IV of the Public Welfare Code, Pa. Stat. Ann. tit. 62, § 401 *et seq.*, which expressed the legislative intent to be:

> to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed, the assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion, or political affiliation; and that the assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society. Pa. Stat. Ann. tit. 62, § 401.

See also 42 U. S. C. § 1396a(19).

Under the Medicaid program and Pennsylvania regulations a patient may be transferred or discharged from a skilled nursing facility only for cause—"for medical reasons or for his welfare or that of other patients, or for his nonpayment for his stay." 42 C. F. R. § 405.1121(k)(4) (1977); 28 Pa. Code § 201.34(h). See also 28 Pa. Code § 201.29(e); 28 Pa. Code § 201.30(b).[40]

In a number of situations less compelling than that now presented[41] the Court has found a property interest to require some form of process where the rights in question could be suspended only for cause. In *Perry v. Sindermann*, 408 U. S. 593 (1972), the Court held that a non-

39. For historical overview of Pennsylvania's implementation of its duty to provide health care to indigents, see, Shay, *Pennsylvania Law of Hospital Supervision: Its Origin and Present Meaning*, 51 TEMPLE L. Q. 187 (1978).

40. While one may understandably have no right to a hearing prior to one's admission to a nursing facility, once there, the right to affiliation with the institution becomes fixed, absent cause. As the Court has recognized "[T]here is a human difference between losing what one has and not getting what one wants." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S. Ct. 2100, 2105 (1979), quoting from Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975), where the Court noted the crucial distinction between an initial grant of parole and its revocation.

41. The Court has previously recognized that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. *Memorial Hospital v. Maricopa County*, 415 U. S. 250, 259 (1974). In a footnote to the quoted material, the Court stated: "Similarly President Nixon has observed that '"[i]t is health which is real wealth," said Ghandi, "and not pieces of gold and silver."' Health, Message from the President, 92d Cong, 1st Sess, HR Doc No. 92-49, p. 18 (1971)."

tenured teacher who had been employed for a number of years should be given an opportunity to prove that the existence of rules and understandings, promulgated and fostered by state officials, gave the teacher a legitimate claim of entitlement to continued employment absent "sufficient cause," which cause could be challenged at a hearing. 408 U. S. at 599-603. Similarly, in *Arnett v. Kennedy*, 416 U. S. 134 (1974), the Court recognized that where by statute a non-probationary federal employee could be discharged only for cause, the employee had a property interest under the Due Process Clause and was entitled to some form of hearing as to the existence of cause. In *Memphis Light, Gas and Water Division v. Craft*, 436 U. S. 1, 9-11 (1978), the Court upheld a due process claim of entitlement to continued utility service since under Tennessee law a public utility could not terminate service at will but only for cause.

These factors are equally applicable to the rights of the Patients once they became residents of a skilled nursing facility. They, much like the teacher in *Sindermann*, or the federal employee in *Arnett*, or the customer in *Memphis Light, Gas and Water Division*, can only lose the right and entitlement to remain in the facility upon certain specified conditions, the existence of which they have a right to contest at a hearing. This factor was recognized by a majority of the Court of Appeals for the Third Circuit as giving the Patients a legitimate claim of entitlement to process prior to a termination of their residency.

Most courts which have considered similar issues are in accord with the holding of the Third Circuit. In *Bracco v. Lackner*, 462 F. Supp. 436 (N. D. Cal. 1978), elderly patient-residents at a joint skilled and custodial care facility brought a class action claiming that their health and

lives were endangered by an imminent cut-off of federal and state Medicaid benefits forcing their immediate removal without notice or opportunity for a hearing. In enjoining the cut-off of funds the court held that extension of nursing home benefits might create in the patients an interest in continued occupancy protected by the Due Process Clause; and that regulations providing that a patient may be "transferred or discharged only for medical reasons, or for his welfare or that of other patients, or for non-payment for his stay," vested the patients with property interests in their continued occupancy. 462 F. Supp. at 452. *Accord, Feld v. Berger*, 424 F. Supp. 1356 (S. D. N. Y. 1976) [decided on non-constitutional grounds]; *Roberson v. Wood*, 464 F. Supp. 983 (E. D. Ill. 1978); *Stitt v. Manor Care, Inc.*, MEDICARE AND MEDICAID GUIDE (CCH) New Developments ¶ 29,409 (N. D. Ohio 1978); *Ivy Nursing Home, Inc. v. Califano*, [1977-1978 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶ 28,470 (W. D. Pa. 1977), *appeal dismissed by stipulation*, No. 77-2176 (3d Cir., Oct. 3, 1977); *Mabel Dunn Rest Home, Inc. v. Weinberger*, 9 Clearinghouse Review 200 (D. R. I., June 5, 1975). *Contra, Nicobatz v. Weinberger*, [1974-1976 Transfer Binder] MEDICARE AND MEDICAID GUIDE (CCH) ¶ 27,427 (C. D. Cal. 1974) [no effort to prove transfer trauma].

3. The Patients Are Deprived of Life and Liberty by Decertification of Town Court and Their Transfer to Another Facility.

Petitioner asserts that "[t]his case raises the discrete question of whether Medicaid recipients have a *property interest* under that program . . . ." [Petitioner's Brief at 12; emphasis added]. HEW, in its brief, likewise observed

"[i]f the patients have *any* cognizable interest under the Due Process Clause, it is more aptly characterized as a property interest than as a liberty interest, and we will refer to it that way here" [HEW Brief at 22 n. 29; emphasis added].

These statements reflect a misunderstanding of the distinction between liberty and property. They also overlook *in toto* a distinct basis for which due process rights must be afforded—a deprivation of life.

The terms "life" and "liberty" include all personal—as distinguished from property—rights.[42] Over one hundred years ago, the distinction was succinctly stated:

> Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Property is everything which has exchangeable value . . . *Slaughter-House Cases,* 16 Wall. 36, 127, 21 L. Ed. 394, 425 (1872) (Swayne, J., dissenting).

And in *Meyer v. Nebraska,* 262 U. S. 390, 399 (1923), the Court observed that the notion of liberty comprises many basic rights indeed:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [citations omitted]

See also *Board of Regents v. Roth,* 408 U. S. 564, 573 (1972); *Kent v. Dulles,* 357 U. S. 116 (1958); *United States v. Laub,* 385 U. S. 475 (1967); *Bolling v. Sharpe,* 347 U. S. 497 (1954); *Griswold v. Connecticut,* 381 U. S. 479 (1965).

Decertification of Town Court and consequent removal of the Patients to another facility could cause transfer trauma, an increased possibility of untimely death or serious illness of elderly, infirm persons who are transferred from one location to another. It is a phenomenon which has been isolated and documented by medical and other experts, recognized by the courts, and acknowledged even by Petitioner and HEW.[43] The effects of transfer

42. Patients concede that the two interests may parallel each other. Regardless of the precise line of demarcation between liberty and property, *Lynch v. Household Finance Corp.,* 405 U. S. 538, 552 (1972), these two interests have a different content. *Compare, e.g., Bishop v. Wood,* 426 U. S. 341, 344-47 (1976) [discussion of property interest] *with Bishop v. Wood, id.* at 347-49 [discussion of liberty interest]; and *Goss v. Lopez,* 419 U. S. 565, 574 (1975) [discussion of property interest] *with Goss v. Lopez, id.* at 574-75 [discussion of liberty interest]. See also *Board of Regents v. Roth,* 408 U. S. 564, 571-78 (1972).

43. As to professional literature documenting the potential harmful effects of transferring elderly patients, see, *e.g.,* Hesselkus, *Relocation Stress and the Elderly,* 32 American Journal of Occupational Therapy 631 (Nov.-Dec. 1978); Zweig and Csank, *Mortality Fluctuations Among Chronically Ill Medical Geriatric Patients As An Indicator of Stress Before And After Relocation,* 24 Journal of American Geriatrics Society 264 (1976); Brand and Smith, *Life Adjustment and Relocation of the Elderly,* 29 Journal of Gerontology 336 (1974); Kral, Grad, and Berenson, *Stress Reactions Resulting From The Relocation of An Aged Population,* 13 Canadian Psychiatric Association Journal 201 (1968). As to courts which recognized the phenomenon see, *e.g., Klein v.*

trauma upon the patients of one nursing home were dramatically described in *Bracco v. Lackner,* 462 F. Supp. 436, 444 (N. D. Cal. 1978):

> . . . Of the 97 [patients], only 46 were placed in facilities in San Francisco; of these 46 patients six have died. Fifty-one patients were transferred to nursing homes outside of San Francisco . . . .
>
> The atmosphere at the Center in recent weeks has been one of fear and uncertainty . . . .
>
> * * *
>
> Patients and their friends or relatives have been found weeping with fear and distress . . . . In some instances patients have cried and shown signs of depression, following the removal of close friends who had been patients . . . .
>
> In some cases, supportive patient friendship have been undermined . . . .
>
> In another case, the patient did not survive the initial move between floors of the Center . . . .
>
> * * *
>
> Another patient, Ellis W., who suffered from advanced cardiovascular disease and diabetes, died just as significant numbers of patients had begun to be moved from the Center . . . .

43. (Cont'd.)
Mathews, 430 F. Supp. 1005, 1009 (D. N. J. 1977) [and cases cited therein]; *Greenwald v. Whalen,* 78 Civ. 2765—CSH, text at n. 13 (S. D. N. Y., Jan. 23, 1979) [judicial notice taken of the existence of transfer trauma]. As to Petitioner's acknowledgement of this problem, see *Brown v. Commonwealth of Pennsylvania, Department of Public Welfare,* — Pa. Commw. Ct. —, 401 A. 2d 616, 618 (1979). As to HEW's recognition of the same, see Technical Assistance Memorandum AoA-TA-75-1 (Feb. 19, 1975) [cited in *Klein v. Mathews,* 430 F. Supp. at 1009].

In the face of exposure to grave illness and even untimely death, the Patients are entitled at a minimum to "some form of hearing" before being uprooted. It falls squarely within the principle basic to our society that one has a right to be heard prior to being forced to suffer a grievous loss of any kind, even though it may not involve the stigma and hardships of criminal conviction. *Mathews v. Eldridge,* 424 U. S. 319, 333 (1976); *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring); *but see Ingraham v. Wright,* 430 U. S. 651, 672 (1977).

The decertification of Town Court and the transfer of the Patients to another nursing facility will inflict additional losses upon the Patients. Selection of a nursing home is often based on geographic proximity to family and friends. Affiliations with staff and fellow patients are developed. Both of these factors are invaluable to persons, such as the Patients, who are old and sick.[44]

The Court has noted that the right to associate freely, like freedom of speech, "lies at the foundation of a free society," *Shelton v. Tucker,* 364 U. S. 478, 486 (1960). The right of Patients to associate, or not to disassociate, with fellow patients and staff takes on many of the qualities which traditionally receive constitutional protection. The psychological and physical well-being which these associations provide to Patients are no less important than the right of organizations to channel their members to appropriate legal assistance, *NAACP v. Button,* 371 U. S. 415 (1963), and *Brotherhood of Railroad Trainmen v. Virginia,*

44. HEW's interpretive guidelines cite, as an example of the "welfare" of a patient, moving the patient so as to facilitate visits by relatives and friends. See p. 18, n. 23, *supra.* These factors have been given weight even in transfer of prisoner from one institution to another. See, *e.g., United States ex rel. Haymes v. Montayne,* 505 F. 2d 977, 981-82 (2d Cir. 1974), *rev'd on other grounds* 427 U. S. 236 (1976); *Stone v. Egeler,* 377 F. Supp. 115, 117-18 (W. D. Mich. 1973).

374 U. S. 1 (1964); or the right to union association without prior restriction. *Thomas v. Collins*, 323 U. S. 516 (1945). The "emotional attachments that derive from the intimacy of daily association," recognized by the Court in the foster parent-child relationship, *Smith v. Organization of Foster Families For Equality and Reform*, 431 U. S. 816, 844 (1977), are similarly present in the relationship among Patients and staff. That association is embraced in fundamental concepts of liberty and should not be regarded with indifference, as manifested by the approach of Petitioner and HEW.

4. Patient Input Prior to Decertification Will Not Thwart Federal Policy and Will Reduce the Risk of an Erroneous Deprivation of Life, Liberty, and Property.

Even assuming that the Patients have rights of constitutional dimension, Petitioner and HEW contend that the administrative burdens imposed by pre-termination hearings would "invite administrative paralysis. . . ." (Petitioner's Brief at 11; HEW Brief at 38-39). Although this argument has been raised at each level of this case, no evidence has been offered to support it.

To the contrary, examination of unpublished HEW data (summarized in appendix to brief A1-A3), shows that since 1974, nationwide, there have been an average of forty involuntary terminations of skilled nursing facilities each year from which approximately two appeals were filed annually with HEW.[45] Even if intermediate care facility

45. These numbers may be reduced further if terminations resulting from violation of the *Life Safety Code*, not in issue here, are omitted. See, *e.g.*, *Caton Ridge Nursing Home, Inc. v. Califano*, 596 F. 2d 608 (4th Cir. 1979) (per curiam); *Moore v. Johnson*, 582 F. 2d 1228 (9th Cir. 1978); *Case v. Weinberger*, 523 F. 2d 602 (2d Cir. 1975). However, the HEW records studied do not disclose the basis for decertifications.

terminations are also considered, the average number of terminations per year increases only to seventy-five and the number of appeals to four. This de minimis[46] administrative burden should be easily borne with little or no impact on the administration of the Medicaid program.

No process is at present afforded patients prior to decertification.[47] The input of patients is minimal, uncertain, and indirect at best, occurring solely during sporadic nursing home surveys. Petitioner and HEW argue, however, that this is somehow sufficient because survey teams are required to seek the views of patients during compliance surveys. This argument overlooks the fact that there is no evidence in this record that any interviews occurred during the surveys pertinent to the decertification decision before the Court [see n. 14, *supra*]. Further, as indicated by the study of HEW decertifications summarized above, in the overwhelming number of instances provider agreements are renewed.

When a tentative decision to decertify is made, patients should be given notice and an opportunity to be heard, as they have little or no means of knowing during the course of a survey whether or not decertification and ultimate involuntary transfer is truly at risk.[48] Furthermore, a probability exists that some patients who

46. In contrast, the total number of Social Security appeals are in the tens of thousands, *White v. Mathews*, 434 F. Supp. 1252, 1254 and n. 4 (D. Conn. 1976) [backlog of pending appeals in excess of 87,000 nationally], *aff'd* 559 F. 2d 852 (2d Cir. 1977), *cert. denied sub-nom. Califano v. White*, 435 U. S. 908 (1978). *See also Richardson v. Perales*, 402 U. S. 389, 406 (1971) [over 20,000 disability claims hearings annually].

47. But see argument, *infra*, pp. 46-48.

48. California uses a two-step decertification process with two inspections. Under such a system, patients could receive notice of threatened transfer. *Paramount Convalescent Center, Inc. v. Department of Health Care Services*, 15 Cal. 3d 489, 125 Cal. Rptr. 265, 542 P. 2d 1, 5-6 (1975), *cert. denied*, 425 U. S. 992 (1976).

may wish to assert their views, or have their views asserted on their behalf, may not be among those chosen for interview. Moreover, to the extent patients are interviewed the type of information solicited may fall short of being truly meaningful in respect to their interests [see n. 14, *supra*].

HEW concedes that the "decision to terminate . . . a nursing home may be important to patients" [HEW Brief at 17], and represents that it "plans to initiate rulemaking in the near future to consider what further procedures may be appropriate for patient participation in the survey and termination process" [HEW Brief at 37]. Nevertheless Petitioner and HEW attack Judge Adams' conclusion below that the Patients' views should be presented with the disturbing argument that:

> [t]he concurring opinion [Adams, J.] assumes that the patients would be competent to offer relevant information on the issue of whether or not the nursing home is in compliance with the requirements of the program. However, the conditions of participation for nursing homes in the Medicaid program are, of necessity, technical matters requiring expert evaluation. In these areas, the patients' opinion certainly will not significantly reduce the risk that the government will make a mistake in assessment of the nursing home's compliance. . . . [Petitioner's Brief at 19] [49]

HEW takes the same view [HEW brief at 39-40].

49. This Court has previously recognized that "a primary function of legal process is to minimize the risk of erroneous decisions." *Mackey v. Montrym*, 47 U. S. L. W. 4798, 4801 (June 26, 1979); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S. Ct. 2100, 2106 (1979). Therefore, consideration should be given to likelihood of an erroneous deprivation of the private interest as a consequence of the procedures used. *Mackey, supra; Mathews v. Eldridge*, 424 U. S. 319, 335 (1976). The possibility

The fact that some patients may not be competent to offer relevant information is of no consequence to their right to a hearing. Pennsylvania's patient bill of rights specifically permits appointment of a guardian for an incompetent patient, one who is medically incapable of understanding his rights, or one who exhibits a communication barrier. 28 Pa. Code § 201.34(v). The need to consider this approach is particularly appropriate in this case where the basis for the decertification relates to patient care of extremely ill persons. The situation is unlike that presented in *Moore v. Johnson*, 582 F. 2d 1228 (9th Cir. 1978), and *Caton Ridge Nursing Home, Inc. v. Califano*, 596 F. 2d 608 (4th Cir. 1979) (per curiam), in which the alleged deficiencies concerned violations of the *Life Safety Code* where patient input is understandably of limited value.

The district court in *Klein v. Mathews*, 430 F. Supp. 1005, 1011 (D. N. J. 1977), categorically rejected the view presented by Petitioner and HEW, stating: "it is rank paternalism to suggest that patients who live in a facility, who have firsthand knowledge of the conditions, who are best equipped to describe how that facility has served them, cannot contribute to the process by which it is determined whether the facility meets federal standards. . . ." Similarly Judge Adams recognized that:

49. (Cont'd.)
of erroneous decisions occurring and the need for representation of patient's interests in that decision is manifest inasmuch as the multiple layers of regulation applicable to nursing homes have been described as "a Serbonian bog." *Feld v. Berger*, 424 F. Supp. 1356, 1357 (S. D. N. Y. 1976). Circuit Judge Friendly has stated that "there has developed a degree of complexity in the Social Security Act and particularly the regulations which make them almost unintelligible to the uninitiated." *Friedman v. Berger*, 547 F. 2d 724, 727 n. 7 (2d Cir. 1976). See appendix to brief, A2-A3, where three reversals are reported in the six decertification decisions decided on the merits.

> The fact that many residents are physically or mentally too infirm to take advantage of any procedural machinery that would be established is an inadequate reason for not setting up a mechanism that will meaningfully represent their constitutionally-protected interest. If a patient is too sick to participate, he may be too sick to be transferred, and the investigator should be required to look into that possibility. Also, the needs of these unfortunate individuals can be presented by relatives, friends, or other representatives who should be notified of such opportunity. 586 F. 2d at 294.[50]

The input of a party seeking process is particularly appropriate where the governmental procedures create an undue risk of an erroneous deprivation. *Califano v. Yamasaki,* 61 L. Ed. 2d 176 (1979). Therefore, "[i]n view of the discretionary nature of a decision to decertify an institution . . .",[51] no substantial reasons exist why patients should not have input into a decision which so vitally affects their well-being and lives. Only then can the risk of erroneous decisions to decertify be minimized.[52]

50. The issue of appropriate representation for the nursing home resident has been discussed elsewhere. *Yaretsky v. Blum,* 592 F. 2d 65, 68 (2d Cir. 1979) [state under obligation to provide representation for patient in certain instances]; *Burchette v. Dumpson,* 387 F. Supp. 812, 818 (E. D. N. Y. 1974). Representatives of patients could, at minimum, inspect the survey reports, a right which is well established. See, *e.g., Stretch v. Weinberger,* 495 F. 2d 639 (3d Cir. 1974). Further, interested and responsible citizens have the right under Pennsylvania regulations to enter nursing homes to consult with patients. 3 Pa. Bulletin 76, 1105 (1973); Comment, *Nursing Home Access: Making the Patient Bill of Rights Work,* 54 J. URBAN L. 473, 479 (1977).

51. This was specifically recognized by Judge Adams, noting that "[t]he distinction between qualified and unqualified homes is not marked by a bright line." 586 F. 2d at 293.

52. If Town Court were certified only under the Pennsylvania Medical Assistance Program, a pretermination hearing would be provided by Pennsylvania practice and patient participation would be permitted. Likewise, if Town Court's license was being threatened, it also would receive a pretermination hearing and patient participation would be permitted. Here, Town Court, which had no Medicare patients at the time of decertification, was barred from a pretermination hearing because of its joint certification. Although the law is not clear on the issue, it is likely that if Town Court now chose to withdraw from Medicare it would receive a pretermination hearing from the state authorities. This difference in treatment of Pennsylvania Medical Assistance patients between those in homes certified only under that program and those in homes which are jointly certified is arbitrary and further indicates the failure of Petitioner to recognize the Patients' rights.

Our most fundamental concepts of life and liberty require that process be afforded to the Patients, giving them the opportunity to avoid the spectre of transfer trauma as documented in *Bracco.* The concern of Petitioner and HEW for increased administrative costs[53] weighs lightly against this exposure. As the Court noted in *Mathews v. Eldridge,* 424 U. S. 319, 348 (1976):

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision . . . .
>
> • • •
>
> But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of de-

53. See discussion at pp. 40-41 *supra,* and study contained in appendix to this brief. (A1-A3)

cisionmaking in all circumstances. *The essence of due process is the requirement that "a person in jeopardy of* serious loss *[be given] notice of the case against him and opportunity to meet it."* [54] [Emphasis added; citation omitted.]

D. Transfer Trauma Incident to Removal of the Patients to Another Facility Results in Reduction in Assistance Requiring That Notice and a Hearing Be Given the Patients.

Under the existing statutory and regulatory scheme, the Patients must be given notice and a hearing for any action by Petitioner which causes a reduction in their assistance. 45 C. F. R. § 205.10(a)(5) (1977). The uncontradicted testimony of a medical expert in the district court shows that, as alleged in their complaint (A. 11a), the Patients' involuntary transfer from Town Court constitutes a reduction of assistance sufficient to trigger the notice and hearing requirements. The testimony established that transfer of the Patients to another facility could cause "transfer trauma," resulting in serious illness or death. (A. 253a) In *Klein v. Mathews*, 430 F. Supp. 1005 (D. N. J. 1977), the district court concluded that the prospect of transfer trauma caused a reduction in assistance requiring a pretermination hearing, stating that "it would be a callous disregard of the real life consequences to say that a Medicaid patient who suffers transfer trauma is receiving the same benefits under Title XIX as a patient not forced to similarly suffer . . . ." *Id.* at 1010.

54. In *Mathews*, the Court held that a disability benefits claimant was not entitled to a hearing before initial termination of benefits because existing administrative procedures fully comport with due process. There, claimant was afforded two sets of review processes and a conference before termination. Further, claimant had the opportunity of submitting additional evidence at each stage of the proceedings dealing with the one question involved, the extent of his physical disability. During that process he never appealed the adverse decisions to an administrative law judge for a full hearing, even though he could have done so. In some measure at least, the Court's holding was a product of this failure to seek on a post-termination basis the very hearing which claimant was seeking, as a constitutional right, on a pre-termination basis. Further, the Court considered the alternative to a pre-termination hearing as acceptable. The claimant was protected, in theory at least, from complete deprivation by existence of the separately funded government welfare program.

No such administrative due process was afforded here; likewise, no such protection from deprivation is available here. The reliance by Petitioner and HEW on *Mathews* is, therefore, misplaced.

In its brief, HEW takes issue with this finding, asserting without citation: "[t]he 'assistance' referred to by the regulation is the monetary amount of benefits, not the psychic welfare that the benefits provide . . ." (HEW Brief at 27 n. 37). HEW regulations do not define "assistance"; however, HEW's own guidelines, interpreting its patient rights regulations restricting transfers of patients from skilled nursing facilities harmful to their welfare, define "welfare" to include the patients' social and emotional well-being. See p. 18, n. 23, *supra*.

Further, Petitioner, the party immediately responsible for implementing 45 C. F. R. § 205.10(a)(5) (1977), is guided by Pennsylvania's Public Welfare Code which defines "assistance" as follows:

> money, *services, goods, shelter, burial* and medical, chiropractic *and other health care,* including nursing home care provided from or *with state, federal, county, county institutions, district or municipal funds,* for needing persons who reside in Pennsylvania and need assistance to provide for themselves and their dependents *a decent and healthful standard of living,* and for needy, homeless or transient persons. Pa. Stat. Ann. tit. 62, § 402. [emphasis added.]

This definition supports the contention that a patient forced to move and confronted thereby with serious illness or death suffers a reduction of "assistance"—"services . . . [or] other health care . . . to provide . . . a healthful standard of living." *See Brown v. Commonwealth of Pennsylvania, Department of Public Welfare,* — Pa. Commw. Ct. —, 401 A. 2d 616, 618 (1979) [consideration of "non-medical factors such as friendships, psychological dependence and social behavior"]. Because of this threatened reduction the Patients are entitled to pretermination process. *See Bracco v. Lackner,* 462 F. Supp. 436, 457 (N. D. Cal. 1978).

VI. CONCLUSION.

The Patients face grave consequences if Town Court is decertified and they are forced to move. At a minimum a hearing should be provided the Patients at which they may state their reasons why their nursing home should not be decertified, so that in turn they may remain in an environment which they chose, found hospitable, and desire not to leave.

In light of the conclusion of the district court "that nobody in the administrative end of HEW who is involved in this case so far as a party here has the faintest idea of what they are doing" (A. 531a), the admonition of Justice Brandeis in his dissent in *Olmstead v. United States,* 277 U. S. 438 (1928), is especially pertinent:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

Id. at 479 (footnote omitted).

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

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August, 1979.

Appendix.

INVOLUNTARY TERMINATIONS OF SKILLED NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES, 1974-1978.[1]

Year	*Facility Type*	*Number of Involuntary Terminations*
1974		
	Skilled Nursing Facilities (Title XVIII)*	21
	Skilled Nursing Facilities (Title XIX only)	Not Available
	Intermediate Care Facilities	Not Available
1975		
	Skilled Nursing Facilities (Title XVIII)*	14
	Skilled Nursing Facilities (Title XIX only)	47 (est.)
	Intermediate Care Facilities	4 (est.)
1976		
	Skilled Nursing Facilities (Title XVIII)*	10
	Skilled Nursing Facilities (Title XIX only)	8 (est.)
	Intermediate Care Facilities	90 (est.)
1977		
	Skilled Nursing Facilities (Title XVIII)*	19
	Skilled Nursing Facilities (Title XIX only)	13
	Intermediate Care Facilities	12
1978		
	Skilled Nursing Facilities (Title XVIII)	21
	Skilled Nursing Facilities (Title XIX only)	37
	Intermediate Care Facilities	28

1. Data supplied by Data Management Branch, Division of Field Operations, Health Care Finance Administration, U. S. Dep't of Health, Education, and Welfare, July 25, 1979 and Aug. 3, 1979.

* Includes facilities, such as Town Court, which are certified under both Title XVIII (Medicare) and Title XIX (Medicaid).

HISTORY OF SOCIAL SECURITY ADMINISTRATION APPEALS FROM INVOLUNTARY TERMINATIONS OF SKILLED NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES, 1968-1979.[1]

Total Number of Facilities Filing Appeals From Involuntary Decertifications 48
Total Number of Facilities for Which Information Is Available With Respect to Disposition of Appeals 23
Appeal Abandoned or Withdrawn 5
Appeal Dismissed 2
Decertification Upheld 3
Decertification Reversed 3
Decision Rendered (Outcome Unknown) 10
Time Period Elapsed Between Date of Request for Hearing and Date Decision Rendered on Appeal.*

Provider Series Docket No.	*Year Hearing Requested*	*Year Decided*	*Disposition*	*Years Elapsed*
18	1968	1979	Unknown	11
23	1968	1979	Upheld	11
25	1968	1979	Upheld	11
65	1971	1978	Abandon	7
87	1973	1977	Withdrawn	4
91	1974	1976	Dismissed	2
94	1974	—	Pending	5
102	1975	1978	Withdrawn	3
111	1976	1977	Untimely	1
119	1976	1979	Reversed	3
121	1976	1978	Upheld	2
123	1976	1977	Withdrawn	1
129	1976	1979	Reversed	3
136	1977	1979	Unknown	2
144	1977	1978	Unknown	1

1. Information obtained from Office of Chief Administrative Law Judge, Social Security Administration, U. S. Dep't of Health, Education, and Welfare, Aug. 3, 1979.

* This data is available only for nineteen appeals.

Time Period Elapsed Between Date of Request for Hearing and Date Decision Rendered on Appeal (Continued).

Provider Series Docket No.	*Year Hearing Requested*	*Year Decided*	*Disposition*	*Years Elapsed*
153	1978	1978	Unknown	0
155	1978	1979	Withdrawn	1
157	1978	1979	Reversal	1
162	1979	1979	Unknown	0

Average Period From Year Hearing Requested Until Decision Rendered ..... 3.6 Years
(excluding Nos. 18, 23 and 25) ..... 2.25 Years

UNITED STATES CONSTITUTION.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C.

§ 1396a. State plans for medical assistance—Contents.

(a) A State plan for medical assistance must—

* * *

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients;

45 C. F. R.

§ 205.10. Hearings.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, XVI or XIX of the Social Security Act shall provide for a system of hearings under which:

* * *

(5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance. A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.

(i) A request for a hearing is defined as a clear expression by the claimant (or his authorized representative acting for him), to the effect that he wants the opportunity to present his case to higher authority. The State may require that such request be in written form in order to be effective;

(ii) The freedom to make such a request shall not be limited or interfered with in any way. The agency may assist the claimant to submit and process his request;

(iii) The claimant shall be provided reasonable time, not to exceed 90 days, in which to appeal an agency action;

(iv) Agencies may respond to a series of individual requests for hearing by conducting a single group hearing. Agencies may consolidate only cases in which the sole issue involved is one of State or Federal law or policy or changes in State or Federal law. In all group hearings, the policies governing hearings must be followed. Thus, each individual claimant shall be permitted to present his own case or be represented by his authorized representative;

(v) The agency may deny or dismiss a request for a hearing where it has been withdrawn by the claimant in writing, where the sole issue is one of State or Federal law requiring automatic grant adjustments for classes of recipients, where a decision has been rendered after a WIN hearing before the manpower agency that a participant has, without good cause, refused to accept employment or participate in the WIN program, or has failed to request such a hearing after notice of intended action for such refusal, or where it is abandoned. Abandonment may be deemed to have occurred if the claimant, without good cause therefor, fails to appear by himself or by authorized representative at the hearing scheduled for such claimant.

HEW INTERPRETIVE GUIDELINES AND SURVEY PROCEDURES FOR THE APPLICATION OF THE CONDITIONS OF PARTICIPATION FOR SKILLED NURSING FACILITIES.

STANDARD *

(4) Is transferred or discharged only for medical reasons, or for his welfare or that of other patients, or for non-payment for his stay (except as prohibited by titles XVIII or XIX of the Social Security Act), and is given reasonable advance notice to ensure orderly transfer or discharge, and such actions are documented in his medical record;

INTERPRETIVE GUIDELINES

1. The term "transfer" applies to the movement of a patient from one location to another within a facility, as well as movement to another facility.
2. "Medical reasons" for transfer or discharge are based on the patient's needs and are determined and documented by a physician. Movement may be required to provide a different level of care.
3. "Welfare" of a patient or that of other patients refers to their social or emotional well being. This is a complex concept in that assessment can vary with each individual patient, facility, and surveyor. An example of moving a patient for his welfare is to facilitate visits by relatives and friends. A patient might also be transferred or discharged because his behavior poses a continuing threat to himself (i.e., suicidal) or to the well being of other patients (e.g., his behavior is incompatible with their needs and rights).

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* 42 C. F. R. § 405.1121(k)(4).

4. Non-payment for services rendered may be a legitimate reason for transfer or discharge. However, it is important to note that Title XVIII and XIX have special regulations dealing with patients' fiscal responsibilities.

SURVEY PROCEDURES

1. The surveyor reviews policies and procedures regarding transfer and discharge, and the mechanism for providing the patient reasonable advance notice, and verifies that they are implemented.

PA. STAT. ANN. TIT. 62.

§ 401. Legislative intent.

It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society. 1967, June 13, P. L. —— , No. 21, art. 4, § 401.

§ 402. Definitions.

As used in this article:

"Assistance" means money, services, goods, shelter, burial and medical, chiropractic and other health care, including nursing home care provided from or with State, Federal, county, county institution, district or municipal funds, for needy persons who reside in Pennsylvania and need assistance to provide for themselves and their dependents a decent and healthful standard of living, and for needy, homeless or transient persons.

* * *

§ 441.1. Persons eligible for medical assistance.

The following persons shall be eligible for medical assistance:

(1) Persons who receive or are eligible to receive cash assistance grants under this article;

(2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act;[1] and

(3) The medically needy.

1967, June 13, P. L. 31, art. IV, § 441.1, added 1968, July 31, P. L. 904 No. 273, § 5.

§ 442.1. The medically needy; determination of eligibility.

A person shall be considered medically needy if he:

(1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom; and

(2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards the department shall take into account (i) the funds certified by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living.

1967, June 13, P. L. 31, art. IV, § 442.1, added 1968, July 31, P. L. 904, No. 273, § 5.

§ 443.1. Medical assistance payments for institutional care.

The following medical assistance payments shall be made in behalf of eligible persons whose institutional care is prescribed by physicians:

* * *

1. 42 U. S. C. A. § 1396 et seq.

(3) Rates on a cost-related basis established by the department for skilled nursing home or intermediate care in a non-public nursing home, when furnished by a nursing home licensed or approved by the department and qualified to participate under Title XIX of the Federal Social Security Act;

* * *

28 PA. CODE.

§ 201.29. Admission policy.

(a) A nursing facility shall not obtain from or on behalf of patients any release from liabilities or duties imposed by the general law or these regulations except as part of formal settlement in litigation.

(b) A nursing facility shall admit only those patients whose nursing care and physical needs can be provided by the staff and facility.

(c) A patient who becomes mentally disturbed after admission and who may cause injury to himself or others may be treated in the facility by appropriate medical management and supervision. If the patient cannot be managed, immediate arrangements shall be made by the attending physician for the transfer of the patient to an appropriate facility at the earliest practical time.

(d) As changes occur in the patient's physical condition which necessitates a change in care which the facility is not prepared to give, immediate arrangements must be made to have the patient transferred to another appropriate facility which can care for the patient.

(e) When a patient's condition changes it is not necessary to transfer a patient within or between facilities when, in the opinion of the attending physician, such transfer might be harmful to the physical and mental health of the patient. The physician must document accordingly on the patient's record.

(f) Patients with any disease in the communicable stage shall not be admitted to the facility.

(g) Patients, who in the opinion of a qualified physician, are not infectious and are receiving appropriate antituberculosis chemotherapy may be admitted to the facility.

(h) A patient who develops a communicable disease after admission shall be medically isolated from other patients. If he cannot or should not be managed in the facility, immediate arrangements shall be made by the attending physician for the transfer of the patient to an appropriate facility at the earliest practical time.

(i) The fact that a patient develops a communicable disease after admission shall be reported to the appropriate health agencies and Regional Offices.

(j) When a communicable disease develops, adequate steps shall be taken to determine the source and degree of dissemination of the disease.

§ 201.30. Discharge policy.

(a) There shall be a centralized coordinated discharge plan to ensure that each patient has a program of needed continuing care both during his stay and after discharge from the facility. This plan must be developed within seven days of admission.

(b) Except in an emergency, a patient shall not be transferred or discharged from the facility without prior notification of next of kin or sponsor. Suitable clinical notes, list of orders, and all medications as directed by the attending physician shall accompany the patient if he is sent to another medical facility.

(c) If the person transferred or discharged from the facility is a patient of the Base Service Unit, the Base Service Unit shall be notified and consulted in advance of any transfer or discharge.

(d) The facility shall maintain written arrangements with one or more general hospitals and skilled nursing facilities under which such institutions agree to timely acceptance, as patients thereof, of acutely ill patients of

the intermediate care facility who are in need of hospital or skilled nursing facility care.

(e) A facility that has multi-level care does not need to have a transfer agreement with an outside facility of that level of care, but must have clearly defined procedures for the transfer of a patient from one level of care to another.

§ 201.34. Patient and employe rights.

(a) The governing body of the facility shall establish written policies regarding the rights and the responsibilities of patients and through the administrator is responsible for development of and adherence to procedures implementing such policies.

(b) These policies and procedures shall be made available to patients, to any guardians, next of kin, sponsoring agency or responsible person.

(c) There shall be available to staff, patients, consumer groups, and interested public, policies of the facility, including a written outline of its objectives and a statement of the rights of its patients. This policy must set forth the rights of the patients and prohibit mistreatment and abuse of the patient.

(d) The staff of the facility shall be trained and involved in the implementation of these policies and procedures.

(e) The patient or a legally responsible representative or both, or in the case of a Medical Assistance recipient, the recipient or the relevant County Board of Assistance in the absence of a legally responsible representative or both, shall be informed verbally and in writing prior to or at the time of admission and during his

stay, of service available in the facility and of related charges not covered by the basic *per diem* rate of the facility.

(f) The patient shall be fully informed as evidenced by the written acknowledgment of the patient prior to or at the time of admission and during stay of these rights and of all rules and regulations governing patient conduct and responsibilities.

(g) The physician shall inform the patient of his medical condition unless it is medically contraindicated, as documented in the medical record, and is afforded the opportunity to participate in the planning of his medical treatment. The patient has the right to refuse to participate in experimental research.

(h) The patient shall be transferred or discharged only for medical reasons or for his welfare or that of other patients or for nonpayment for his stay. The patient is given reasonable advance notice to ensure orderly transfer or discharge. Such actions are documented in the medical record of the patient.

(i) The patient is encouraged and assisted throughout his period of stay to exercise his rights as a patient and as a citizen and to this end may voice grievances and recommend changes in policies and services to facility staff or to outside representatives of his choice or both. In addition, the patient shall be made aware of the Governor's Action Line (Toll Free 800 932-0784) to which the patient may address grievances when he or she feels they will not be properly resolved through the grievance machinery of the facility.

(j) The patient shall be free from restraint, interference, coercion, discrimination, or reprisal.

(k) The patient may manage his personal financial affairs.

(l) If the facility accepts the responsibility for the financial affairs of the patient, the patient must designate the transfer of responsibility in writing. Further, the facility must give the patient an accounting of all financial transactions made on the behalf of the patient. This accounting must be done at least quarterly.

(m) The patient shall be free from mental and physical abuse and free from chemical and, except in emergencies, physical restraints except as authorized in writing by a physician for a specified and limited period of time or when it is necessary to protect the patient from injury to himself and to others.

(n) The patient shall be assured confidential treatment of his personal and medical records and may approve or refuse their release to any individual outside the facility, except in case of his transfer to another health care institution or as required by law or third party payment contract.

(o) The patient shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs.

(p) The patient shall not be required to perform services for the facility that are not included for therapeutic purposes in his plan of care.

(q) The patient shall be permitted to associate and communicate privately with persons of his choice. The patient shall be permitted to send and receive his personal mail unopened, unless medically contraindicated as documented by his physician in the medical record.

(r) The patient shall be permitted to participate in social and religious activities.

(s) The patient shall be permitted to meet with community groups at his discretion unless medically contraindicated, as documented by his physician in his medical record.

(t) The patient shall be permitted to retain and use his personal clothing and possessions as space permits unless to do so would infringe upon rights of other patients and unless medically contraindicated, as documented by his physician in his medical record.

(u) If married, the patient is assured privacy for visits by his or her spouse. If both are patients in the facility, they are permitted to share a room unless medically contraindicated, as documented by the attending physician in the medical record.

(v) All rights and responsibilities specified in paragraphs (f), (g), (h), and (i) devolve to the guardian of such patient, next of kin, sponsoring agency, or representative payee in the following instances:

(1) A patient adjudicated incompetent in accordance with Commonwealth law.

(2) A patient who is found by his physician to be medically incapable of understanding these rights.

(3) A patient who exhibits a communication barrier.

(w) The aforementioned patient rights shall be reflected in the policies and procedures of the facility.

(x) No employe shall be punished or harassed by the facility or by its agent because of the efforts to avail himself of his rights.

(y) There shall be written policies that provide for the registration of employe complaints without threat of discharge or other reprisals.

(z) This section of the Long Term Care Facilities Regulations (28 Pa. Code § 201.34) entitled, "Patient and Employe Rights" shall be posted in a highly conspicuous place which is visible to the patients and employes.

§ 201.35. Access Requirements.

(a) Visiting hours shall consist of a minimum of eight hours per day during the period of 8 a.m. and 8 p.m.

(b) Visiting hours shall be posted in a conspicuous and public place.

(c) The facility shall permit members of recognized community organizations and representatives of community legal service programs whose purposes include rendering assistance without charge to patients to have access to the facility.

(d) The facility may limit access where it may be a detriment to the care and well being of the patient or patients in the facility. At no time may the facility restrict the right of the patient to have legal representation.

(e) The purpose of these visits may be to:

(1) Visit, talk with, and make personal, social and legal services available to all patients.

(2) Inform patients of their rights and entitlements and their corresponding obligations, under Federal and State laws by means of distribution of educational materials and discussion in groups and with individual patients.

(3) Assist patients in asserting their legal rights regarding claims for public assistance, medical assistance, and Social Security benefits, as well as in all other matters in which patients are aggrieved. Assistance may be provided individually, as well as on a group basis, and may include organizational activity as well as counseling and litigation.

(4) Engage in all other methods of assisting, advising, and representing patients so as to extend to them the full enjoyment of their rights.

(f) Persons entering a facility pursuant to this subsection shall promptly advise the administrator or other available agent of the facility of their presence.

(g) Such person shall not enter the living area of any patient without identifying themselves to the patient and without receiving the patient's permission to enter.

(h) Individual patients shall have the complete right to terminate any visit by persons having access pursuant to subsection (c) of this section. Communications between a patient and such persons shall be confidential unless the patient authorizes the release of such information.

(i) The facility shall post in a conspicuous place near the entrances and on each floor of the facility, a notice which sets forth the policy intent of these access regulations. The facility shall on admission, or in the case of a person who is already a patient in the facility or within 48 hours of the effective date of this regulation, provide every patient with a personal copy of such notice. In the case of a patient who for any reason cannot either read, write or understand English, arrangements shall be made to have an interpreter explain this policy to the patient.

(j) A certification of the provision of personal notice as required herein shall be entered in the patient's medical record.

(k) The Department need not be joined as Plaintiff in an action brought to enforce these access regulations.

(l) Nothing in this subsection shall be construed to restrict any right or privilege of any nursing home patient to receive visitors who are not representative of community organizations or legal services programs.

DPW-OMP-MA MANUAL.

9424.6 Skilled Nursing Facility Participation Requirements.

Nursing facilities desiring to participate in the Skilled Nursing Facility Care and Services Program under Title XIX, Medical Assistance, must meet the following requirements:

1. *State Licensure or Approval*

a. A proprietary, non-proprietary or hospital-based skilled nursing facility must be licensed or approved by the Department of Health. A skilled nursing facility certified for Title XVIII is automatically eligible to participate in the Medical Assistance Program.

* * *

2. *Licensed Administrator*

Be under the supervision of a Nursing Home Administrator, licensed by the State Board of Nursing Home Administrators, who is qualified by training and experience for successful operation of a nursing home and who has the necessary authority and responsibility for management of the facility.

3. *Certification Requirements*

a. Meet such provisions of the *Life Safety Code* of the National Fire Protection Association, 21st Edition, 1967, as are applicable to nursing facilities.

b. Have in effect a *Utilization Review Plan and Committee* to evaluate skilled nursing facility patients and related medical services provided in the facility.

c. Provide a statement of full *Disclosure* of *Ownership* for each person having directly or indirectly an ownership interest of 10 per cent or more in the nursing facility. In case a nursing facility is organized as a corporation, the name of each officer and director of the corporation; and in the case of a partnership, the name of each partner. Any changes which would effect the current accuracy of this information must be reported immediately.

d. Have a written *Transfer Agreement* (see Appendix VII) with one or more general hospitals to provide needed diagnostic and other services to patients of the nursing facility, and under which acutely ill patients may be transferred to the hospital ensuring timely admission.

e. Be in compliance with Section 601 of Title VI of the *Civil Rights Act* of 1964 which provides: "No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

f. Have and maintain an *Organized Nursing Service* which is under the direction of a professional registered nurse, who is employed full time by the skilled nursing facility, and which is composed of sufficient nursing and auxiliary personnel to provide adequate and properly supervised nursing services for patients during all hours of each day and all days of each week.

g. Have satisfactory arrangements for *Professional Planning* and *Supervision* of *Menus* and *Meal Service.*

h. Meet conditions relating to *Environment* and *Sanitation* as are applicable to extended care facilities under Title XVIII, Medicare of the Social Security Act.

i. Have satisfactory policies and procedures relating to maintenance of medical records, dispensing and administering of drugs and biologicals, and to physician coverage and emergency medical attention.

4. *Medical Assistance Provider Agreement*

Enter into a *Written Provider Agreement* (see Appendix VIII) with the Department of Public Welfare relating to the provision of services and making of payments. The Department's agreement with a facility will not exceed a period of one year. Execution of a new agreement shall be contingent upon a determination of continued compliance with standards under the provisions of the program.

In the case of any skilled nursing facility determined to be only in "substantial" compliance, as opposed to "full" compliance, the Department's agreement will not exceed a period of 6 months.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
MEDICAL ASSISTANCE PROGRAM
SKILLED NURSING HOME CARE AGREEMENT.

This AGREEMENT entered into by and between the Office of Medical Programs of the Department of Public Welfare, hereinafter referred to as the "Department" and the , as the provider of service, hereinafter referred to as the "Nursing Home."

WITNESSETH:

WHEREAS, the Public Welfare Code, Act 21 of June 13, 1967, P. L. 31, Article IV, provides for skilled nursing home care in private, public, or non-profit facilities, and

WHEREAS, Chapter II of Rules and Regulations of the Social and Rehabilitation Service, Department of Health, Education and Welfare on Standards for Payment for Skilled Nursing Home Care, Part 249.33 (a) (2) require an Agreement between the Department and a facility to provide skilled nursing home care and receive payments under the Medical Assistance Program.

Now, THEREFORE, the parties mutually agree as follows:

A. *Nursing Home Responsibilities*

The Nursing Home agrees to fulfill or meet the following requirements as a basis for participation in the Department's Programs:

1. Meet Federal and State Standards and Requirements for Skilled Nursing Home Operation and Care and be certified to participate as a provider of extended care under Title XVIII or be approved and licensed by the Department to operate a Skilled Nursing Home. Out-of-State

nursing homes are approved by the licensing or supervising authority of that state.

2. Provide Department's patients with facilities, care services and treatment suitable to their illness and of comparable quality with care provided to persons in other circumstances and without regard to the source of the payment for their care.

3. Agree that in the performance of this Agreement that there will be no discrimination against any employee or other person, on account of race, color, sex, ancestry, age, or national origin, and that the Commonwealth upon receipt of evidence of such discrimination shall have the right to cancel this Agreement. The Nursing Home agrees to comply with the requirements of Title VI of the Civil Rights Act of 1964.

4. Will have a Nursing Home Administrator licensed by State Board of Examiners of Nursing Home Administrators.

5. Promptly notify the appropriate County Assistance Office of the Department of any known change in a Department's patient income, eligibility, or living status.

6. Have a written Transfer Agreement with one or more general hospitals with effective arrangements for the transfer of patients and/or prompt availability of diagnostic and other outpatient services as may be requested by the attending physician.

7. Maintain complete and accurate records for Department's patient as set forth in the Rules and Regulations pertaining to Nursing Homes; permit the Department or its agents to have free access to medical records and to furnish information or provide copies of medical records upon request. Records will be maintained a minimum of seven years.

8. Assure that each of the Department's patients have a complete medical evaluation on admission and annually, and a current plan of care which includes physician, nursing and social services for rehabilitation and treatment.

9. Undergo at least an annual, on-site evaluation by a Medical Review Team of the Department to determine whether quality, quantity and level of care requirements are being met by the Nursing Home. Upon written notification by the Department of deficiencies and/or alternative care planning, the Nursing Home will take corrective action within a period not to exceed six months. Failure to correct deficiencies will be a cause for the Department to terminate the agreement, payments, and participation by the Nursing Home in the Department's Programs.

10. File a Utilization Review Plan for approval by the Department and establish an internal Utilization Review Program and Committee of services and facilities of the Nursing Home and a sample of patient records or cases currently receiving care and cases discharged. Physicians having an ownership interest in the Nursing Home may not serve on the Nursing Home's Utilization Review Committee. The Nursing Home will file with the Department a quarterly statistical report of all cases with a sub-total of Medical Assistance Cases reviewed and disposed of by the Nursing Home Utilization Review Committee.

11. Furnish to the Department full and complete information as to the identity: (a) of each person having, directly or indirectly, an ownership interest of 10 percent or more in the Nursing Home; (b) in case the Nursing Home is organized as a corporation; ownership interest of each officer and director of the corporation; and (c) in case the Nursing Home is organized as a partnership, ownership interest in each partner. Changes in ownership will

be promptly reported to the Department and a new agreement must be executed between the Nursing Home and the Department.

12. Plan in cooperation with the County Assistance Offices of the Department to assure the timely transfer to lesser levels of care within 60 days or the timely discharge of Department's patients no longer requiring Nursing Home Care.

13. The Nursing Home will charge the Department or its recipients according to the Department's Regulations for Public or Private Skilled Nursing Care.

14. For payments on behalf of Medical Assistance patients in Public Nursing Homes, submit invoices monthly to the County Assistance Office, on forms provided by the Department and certify that information contained in original or copies of records and invoices submitted is true, accurate, and complete.

15. Recognize that payment and satisfaction of claims will be from Federal and State funds, and that any false claim, statement of documents or concealment of material fact may be cause for prosecution under applicable Federal or State laws.

16. File quarterly statements with the Department on the average daily census and number and types of personnel on each shift during a week of a quarterly period.

17. Public Nursing Homes will file required fiscal reports with the State Auditor General within 90 days after the end of each calendar year or within 90 days after receipt of the forms and instructions, whichever is later. Failure to file a report before March 31, unless an extension of time is granted by the Auditor General, will result in termination of payments and participation upon written notice of the Department.

18. The Nursing Home agrees to abide by the Department's Regulations and all other applicable State and Federal laws and regulations in existence at the effective date of the agreement and as they may be changed from time to time after proper notice of contemplated changes are issued in accordance with existing policies and procedures. Failure by the Nursing Home to comply with laws or regulations shall entitle the Department to terminate the Agreement forthwith. Any new or revised State and Federal Regulations and Laws adopted, which affect this Agreement or the Nursing Home's performance hereunder, constitute an option on the part of the Nursing Home to terminate this Agreement within 30 days if such changes are not acceptable to the Nursing Home.

B. *Department's Responsibilities*

The Department will carry out the following responsibilities:

1. Inspect, certify, and approve Nursing Facilities for participation in the Department's Programs under Title XIX of the Social Security Act.

2. Notify Nursing Facilities in writing of any deficiencies in operation or level of patient care.

3. Determine eligibility of Medical Assistance patients for Nursing Home Care through the Department's County Assistance Offices and notify the Nursing Home.

4. Make payments and any payment adjustments to the Nursing Home according to the Department's Regulations.

5. Assist the home to place or transfer patients to other facilities if the Agreement is cancelled by either party.

C. *General Provisions*

1. This Agreement may be terminated by either party upon 30 days advance written notice. (Either party has the right of appeal within 30 days after receipt of a written notice terminating the agreement).

2. In the event the Agreement is terminated, the obligations of the Department to make payments to the Nursing Home for prior services shall be in accordance with the Department's Regulations governing payments for Nursing Home Care.

3. This Agreement, when approved by the Department, is effective on _____ and will extend until _____. The Agreement will then be considered for renewal in writing for one additional six months period or subsequent one year periods providing the standards and requirements are being met.

In WITNESS WHEREOF, the parties have caused this Agreement to be executed by their officials thereunto duly authorized.

NURSING HOME	DEPARTMENT OF PUBLIC WELFARE
_____	_____
Name	Name
_____	_____
Title	Title
_____	_____
Date	Date

FOR ARGUMENT

Supreme Court, U.S.
FILED
NOV 2 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

January Term, 1979
No. 78-1318

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE,
Petitioner

vs.

TOWN COURT NURSING CENTER, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	PAGE
Argument	1
Appendix—Agreement	6

TABLE OF CITATIONS

CASES:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	3
Ingraham v. Wright, 430 U.S. 651 (1977)	4
Klein v. Califano, 586 F.2d 250 (3d Cir. 1978)	3
Meachum v. Fano, 427 U.S. 215 (1976)	4
Williams v. Paxson Coal Co., 346 Pa. 468, 31 A.2d 69 (1943)	4
Ziminsky v. Ziminsky, 210 Pa. Superior Ct. 266, 231 A.2d 904 (1967)	4

OTHER AUTHORITIES:

Department of Public Welfare—Office of Medical Programs—Medical Assistance Manual Sec. 9427 Appendix VIII (January 1, 1973)	4
Stern & Gressman, Supreme Court Practice, 433-34 (5th ed. 1978)	2

REPLY BRIEF FOR PETITIONER

I.

THIS COURT SHOULD GIVE PLENARY REVIEW TO THE QUESTION PRESENTED

1. Respondents[1] have argued that this Court may not review the question which has been presented in the certiorari petition because the petitioner's predecessor did not appeal from that portion of the District Court's order which was adverse to his interests.[2] Alternatively they contend that, even if petitioner has standing to seek review, the arguments which are being advanced by petitioner and H.E.W. urging reversal were not preserved in the lower court.

The first contention, that petitioner lacks standing to seek review of the Court of Appeals' ruling, fails to recognize that having succeeded in the District Court on the issue of primary importance—the scope of the respondents' due process rights—petitioner was therefore an appellee before the Court of Appeals. And as a proper

[1] Although the United States is technically a respondent before this Court, we refer only to the patients of Town Court as "respondents" in this brief.

[2] In addition to ruling in Petitioner's favor with respect to respondents' request for a preliminary injunction, the District Court ordered that "the defendants shall not withhold payments for services actually provided to patients" (A. 117a). It was this funding order from which only the United States appealed.

party before the Court of Appeals, she is now entitled to seek review of the Court of Appeals' adverse ruling in this Court. It is of little consequence that the favorable district court ruling was defended by H.E.W. rather than petitioner's predecessor.[3] Moreover, this Court's certiorari jurisdiction is very broad and extends to the "petition of any party" 28 U.F.C. §1254 (1); see *Stern & Gressman*, Supreme Court Practice, 433-34 (5th ed. 1978) (which suggests that even a successful party below may properly seek and be granted plenary review in this Court). In short, as a proper party before the Court of Appeals suffering an adverse ruling in that Court, petitioner now has standing to seek review of that ruling here.

2. While it is true that petitioner's predecessor did take the position that he had no interest in the proceedings before the lower court, under these circumstances, the arguments now being advanced by petitioner should be reviewed by this Court. As the Solicitor General has noted, the arguments which are raised in this Court urging reversal, were asserted in the Court of Appeals in defense of the District Court's order. And since the lower court decided the question favorably to respondents, there simply is no reason why petitioner may not now present the question for review here. In addition, it is important to note that H.E.W. is making the same arguments as petitioner and is clearly a proper party here.[4] Thus, because she has standing in this Court, and is raising matters presented to and decided by the Court of Appeals, and because H.E.W. can unquestionably raise the same questions here, this Court should give plenary review to the question and arguments presented by petitioner.

[3] The Solicitor General is correct in noting that the Petitioner's predecessor was not required to file a surplus notice of appeal, when H.E.W., with identical interests, had done so. U.S. Br. at 19.

[4] See U.S. Br. at 19, n. 28.

II.

IF PROPERLY RAISED, RESPONDENTS' CLAIMS UNDER STATE LAW AND ASSERTION OF "LIBERTY" INTEREST IN THE TERMINATION OF TOWN COURT LACK MERIT

1. Respondents have offered two new theories in support of their claim to the protections of the Due Process Clause in this case. First they assert rights as third party beneficiaries to the provider agreement between Pennsylvania and Town Court. Resp. Br. 26-30. And, alternatively, they argue that their liberty interests in freedom of association and life is infringed by the termination of Town Court as a Medicaid provider. Id. at 35-40. However neither of these arguments was presented to the lower court, or for that matter to the District Court, and they should not be considered here. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

Nevertheless, these claims fail on their merits. For example, it is true that, under Pennsylvania law, contractual rights can vest in non-parties to a contract who are intended to benefit from the agreement. It is also correct that if these interests exist they would ordinarily be protectable under the Due Process Clause. However, it is settled Pennsylvania law that a third party beneficiary has no greater rights than are expressed in the contract.

Williams v. Paxson Coal Co., 346 Pa. 468, 31 A.2d 69 (1943); *Ziminsky v. Ziminsky*, 210 Pa. Superior Ct. 266, 231 A.2d 904 (1967). Here the contract between Town Court and Pennsylvania expressly provided that "failure by the nursing home to comply with laws or regulations shall entitle the Department to terminate the agreement forthwith".[6] Thus, even if this contention had been properly asserted, it provides no basis for the decision of the Court of Appeals.

2. Similarly, even if the Court chooses to address the "liberty" interest argument, in our view, it lacks substance. The theory that any government action which adversely affects a particular individual gives rise to a protectable liberty interest under the Due Process Clause has been expressly rejected by this Court. In *Meachum v. Fano*, 427 U.S. 215, 224 (1976), it was noted that, "[w]e reject at the outset the notion that *any* grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the Due Process Clause." See also *Ingraham v. Wright*, 430 U.S. 651 (1977).

Here, the government action complained of, withdrawal of medicaid funding from the Town Court nursing home, undoubtedly will have some impact upon respondents as residents of this home but this is sufficient to trigger the protection of the Due Process Clause. Thus, the argument that the increased risks to respondents which may indirectly result from the termination of Town Court

[6] A form of a typical nursing home provider agreement can be found in Department of Public Welfare—Office of Medical Programs—Medical Assistance Manual §9427 Appendix VIII (January 1, 1973) (copy attached to this Brief as an appendix).

as a Title XIX provider, whatever its factual merit,[7] simply misses the mark. The state has terminated a contractual relationship with a Medicaid provider and, absent a provision in the statute giving the respondents some role in this decision, there is no basis for imposing the restrictions of the Due Process Clause on the government.

Respectfully submitted,

NORMAN J. WATKINS
Special Deputy Attorney General
EDWARD G. BIESTER, JR.
Attorney General
Attorneys for Petitioner

[7] It is important to note that the Court of Appeals expressly refused to predicate its decision in any way on these contentions. *Klein v. Califano*, 586 F.2d 250, 259-60, n. 16 (3d Cir. 1978).

APPENDIX

MEDICAL ASSISTANCE (MA)—
SKILLED NURSING FACILITY CARE AND SERVICES
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
MEDICAL ASSISTANCE PROGRAM
SKILLED NURSING HOME CARE AGREEMENT
9424 APPENDIX VIII

This AGREEMENT entered into ——— by and between the office of Medical Programs of the Department of Public Welfare, hereinafter referred to as the "Department" and the

Nursing Home, as the provider of service, hereinafter referred to as the Nursing Home."

WITNESSETH:

WHEREAS, the Public Welfare Code, Act 21 of June 13, 1967, P.L. 31, Article IV, provides for skilled nursing home care in private, public, or non-profit facilities, and

WHEREAS, Chapter II of Rules and Regulations of the Social and Rehabilitation Service, Department of Health, Education and Welfare on Standards for Payment for Skilled Nursing Home Care, Part 249.33 (a) (2) require an Agreement between the Department and a facility to provide skilled nursing home care and receive payments under the Medical Assistance Program.

Now, THEREFORE, the parties mutually agree as follows:

A. *Nursing Home Responsibilities*

The Nursing Home agrees to fulfill or meet the following requirements as a basis for participation in the Department's Programs:

1. Meet Federal and State Standards and Requirements for Skilled Nursing Home Operation and Care and be certified to participate as a provider of extended care under Title XVIII or be approved and licensed by the Department to operate a Skilled Nursing Home. Out-of-State nursing homes are approved by the licensing or supervising authority of that state.

2. Provide Department's patients with facilities, care services and treatment suitable to their illness and of comparable quality with care provided to persons in other circumstances and without regard to the source of the payment for their care.

3. Agree that in the performance of this Agreement that there will be no discrimination against any employe or other person, on account of race, color, sex, ancestry, age, or national origin, and that the Commonwealth upon receipt of evidence of such discrimination shall have the right to cancel this Agreement. The Nursing Home agrees to comply with the requirements of Title VI of the Civil Rights Act of 1964.

4. Will have a Nursing Home Administrator licensed by State Board of Examiners of Nursing Home Administrators.

5. Promptly notify the appropriate County Assistance Office of the Department of any known change

in a Department's patient income, eligibility, or living status.

6. Have a written Transfer Agreement with one or more general hospitals with effective arrangements for the transfer of patients and/or prompt availability of diagnostic and other out-patient services as may be requested by the attending physician.

7. Maintain complete and accurate records for Department's patient as set forth in the Rules and Regulations pertaining to Nursing Homes; permit the Department or its agents to have free access to medical records and to furnish information or provide copies of medical records upon request. Records will be maintained a minimum of seven years.

8. Assure that each of the Department's patients have a complete medical evaluation on admission and annually, and a current plan of care which includes physician, nursing and social services for rehabilitation and treatment.

9. Undergo at least an annual, on-site evaluation by a Medical Review Team of the Department to determine whether quality, quantity and level of care requirements are being met by the Nursing Home. Upon written notification by the Department of deficiencies and/or alternative care planning, the Nursing Home will take corrective action within a period not to exceed six months. Failure to correct deficiencies will be a cause for the Department to terminate the agreement, payments, and participation by the Nursing Home in the Department's Programs.

10. File a Utilization Review Plan for approval by the Department and establish an internal Utilization Review Program and Committee of services and facilities of the Nursing Home and a sample of patient records or cases currently receiving care and cases discharged. Physicians having an ownership interest in the Nursing Home may not serve on the Nursing Home's Utilization Review Committee. The Nursing Home will file with the Department a quarterly statistical report of all cases with a subtotal of Medical Assistance Cases reviewed and disposed of by the Nursing Home Utilization Review Committee.

11. Furnish to the Department full and complete information as to the identity: (a) of each person having, directly or indirectly, an ownership interest of 10 percent or more in the Nursing Home; (b) in case the Nursing Home is organized as a corporation; ownership interest of each officer and director of the corporation; and (c) in case the Nursing Home is organized as a partnership, ownership interest of each partner. Changes in ownership will be promptly reported to the Department and a new agreement must be executed between the Nursing Home and the Department.

12. Plan in cooperation with the County Assistance Offices of the Department to assure the timely transfer to lesser levels of care within 60 days or the timely discharge of Department's patients no longer requiring Nursing Home Care.

13. The Nursing Home will charge the Department or its recipients according to the Department's Regulations for Public or Private Skilled Nursing Care.

14. For payments on behalf of Medical Assistance patients in Public Nursing Homes, submit invoices monthly to the County Assistance Office, on forms provided by the Department and certify that information contained in

original or copies of records and invoices submitted is true, accurate, and complete.

15. Recognize that payment and satisfaction of claims will be from Federal and State funds, and that any false claim, statement of documents or concealment of material fact may be cause for prosecution under applicable Federal or State laws.

16. File quarterly statements with the Department on the average daily census and number and types of personnel on each shift during a week of a quarterly period.

17. Public Nursing Homes will file required fiscal reports with the State Auditor General within 90 days after the end of each calendar year or within 90 days after receipt of the forms and instructions, whichever is later. Failure to file a report before March 31, unless an extension of time is granted by the Auditor General, will result in termination of payments and participation upon written notice of the Department.

18. The Nursing Home agrees to abide by the Department's Regulations and all other applicable State and Federal laws and regulations in existence at the effective date of the agreement and as they may be changed from time to time after proper notice of contemplated changes are issued in accordance with existing policies and procedures. Failure by the Nursing Home to comply with laws or regulations shall entitle the Department to terminate the Agreement forthwith. Any new or revised State and Federal Regulations and Laws adopted, which affect this Agreement or the Nursing Home's performance hereunder, constitute an option on the part of the Nursing Home to terminate this Agreement within 30 days if such changes are not acceptable to the Nursing Home.

B. *Department's Responsibilities*

The Department will carry out the following responsibilities:

1. Inspect, certify, and approve Nursing Facilities for participation in the Department's Programs under Title XIX of the Social Security Act.

2. Notify Nursing Facilities in writing of any deficiencies in operation or level of patient care.

3. Determine eligibility of Medical Assistance patients for Nursing Home Care through the Department's County Assistance Offices and notify the Nursing Home.

4. Make payments and any payment adjustments to the Nursing Home according to the Department's Regulations.

5. Assist the home to place or transfer patients to other facilities if the Agreement is cancelled by either party.

C. *General Provisions*

1. This Agreement may be terminated by either party upon 30 days advance written notice. (Either party has the right of appeal within 30 days after receipt of a written notice terminating the agreement).

2. In the event the Agreement is terminated, the obligation of the Department to make payments to the Nursing Home for prior services shall be in accordance with the Department's Regulations governing payments for Nursing Home Care.

3. This Agreement, when approved by the Department, is effective on ———————— and will extend

until _____. The Agreement will then be considered for renewal in writing for one additional six months period or subsequent one year periods providing the standards and requirements are being met.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their officials thereunto duly authorized.

NURSING HOME	DEPARTMENT OF PUBLIC WELFARE
Name	Name
Title	Title
Date	Date

DPW-OMP-MA Manual
MSF-54

Effective September 11, 1975

FOR ARGUMENT

Supreme Court, U.S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

No. 78-1318

In the Supreme Court of the United States

OCTOBER TERM, 1979

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE, PENNSYLVANIA, PETITIONER

v.

TOWN COURT NURSING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

Page

Conclusion 13

CITATIONS

Cases:

Greenholtz v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979) 12, 13

Klein v. *Califano*, 586 F. 2d 259 12

LeTuelle v. *Scofield*, 308 U.S. 415 4

Perry v. *Sindermann*, 408 U.S. 593 8

Ryerson v. *United States*, 312 U.S. 405 4

Town Court Nursing Center, Inc. v. *Beal*, 586 F. 2d 266 8

United States v. *New York Telephone Co.*, 434 U.S. 159 3

Youakim v. *Miller*, 425 U.S. 231 4

Zenith Radio Corp. v. *United States*, 437 U.S. 443 11

Constitution, statute and rules:

United States Constitution:

Due Process Clause 1, 9, 10

42 U.S.C. 1396 *et seq.*: 1

Sup. Ct. R. 10(4) 4

Sup. Ct. R. 21(4) 4

Page

Miscellaneous:

Borup, Gallego, and Hufferman, *Relocation and its Effect on Mortality*, The Gerontologist, Vol. 19, No. 2, page 136 (1979) 12

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 3

In the Supreme Court of the United States

OCTOBER TERM, 1979

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HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE, PENNSYLVANIA, PETITIONER

v.

TOWN COURT NURSING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

In this case the court of appeals held that patients residing in a nursing home who are eligible for Medicaid benefits under 42 U.S.C. 1396 *et seq.*, are entitled under the Due Process Clause to a hearing before the Secretary of Health, Education, and Welfare and appropriate state agencies may terminate the participation of (and payments to) the nursing home in the Medicaid program. This holding was based on the court's conclusion that the federal Medicaid statute and the implementing federal regulations give patients a legitimate expectation of entitlement to—and thus a "property" interest in—continued residence in the nursing home of their choice. This Court granted certiorari to decide the claim of petitioner, the Secretary of Public Welfare of Pennsylvania, that this holding is erroneous.

Respondent patients (hereinafter "Patients") and *amici* supporting them contend that (1) this Court has no jurisdiction to decide petitioner's claims, and that even if it does, petitioner did not preserve her claims; (2) for these and other reasons, the writ of certiorari should be dismissed as improvidently granted; (3) apart from federal law, the Patients have a protected property interest based on contract and state law; (4) the court of appeals correctly decided that federal law and regulations give patients a protected property interest in continued residence in the home of their choice; (5) termination of a home's program participation results in "transfer trauma" which reduces the level of Medicaid benefits to which the patients are statutorily entitled; and (6) even if patients have no property interest in the matter, they have a protected "life" or "liberty" interest in continued residence in the home of their choice. These contentions are incorrect.

1. The procedural posture of this case presents two distinct questions: (1) whether this Court has jurisdiction to consider petitioner's contentions; and (2) if so, whether the Court should nevertheless decline to consider them because of petitioner's failure to argue them to the court of appeals.

As we argued in our opening brief (pages 17-20), the Court clearly has jurisdiction to consider petitioner's claims despite the fact that her predecessor did not file an appeal from the district court's judgment. That is so because the district court's judgment was in part in petitioner's favor (*i.e.*, to the extent that it denied plaintiff's motion to extend the preliminary injunction, which had prohibited the State and HEW from discontinuing Medicaid payments to the home, from removing patients from the home, and from prohibiting the placement of additional Medicaid patients; see A. 22a-23a; C.A. App. 222-223, HEW Br. 9-10) and in part

adverse to petitioner (*i.e.*, to the extent it provided that "the defendants [petitioner's predecessor and the Secretary of HEW] shall not withhold payments for services actually rendered to patients" (A-117a)). The patients appealed from the part adverse to them (and favorable to petitioner) and the Third Circuit reversed. Petitioner may certainly seek this Court's review of an adverse judgment that she suffered as appellee.[1] The Patients and amici overlook this point.

In our view, petitioner may also seek review of the Third Circuit's affirmance of the portion of the judgment adverse to her because the Secretary of HEW, to whom it was also adverse, did appeal from that portion of the judgment. We believe it was not necessary for petitioner to file a surplus notice of appeal (see HEW Br. 18-20).[2]

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[1]The two parts of the district court's judgment are not logically consistent because the grounds that would support affirmance of the part favorable to petitionrer would logically call for reversal of the part adverse to her, and vice versa. But that fact does not bar petitioner, who was an appellee in the court of appeals, from challenging the court of appeals' reversal of the part of the judgment in her favor.

It is true that there is some uncertainty with respect to the question whether a party who prevailed below may advance arguments in a reviewing court that would call the scope of the judgment into question even if he is satisfied to accept that judgment. See R. Stern & E. Gressman, *Supreme Court Practice* 480-486 (5th ed. 1978). We believe the better view, supported by *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) and Stern & Gressman, *supra*, is that a party who is content to accept an affirmance may make any argument in support of a judgment without having to file a cross appeal or cross petition, even if the acceptance of the argument would entitle him to greater rights in future cases. But even if we are wrong, that would not deprive the Court of jurisdiction to consider petitioner's claims, because a party can always advance arguments that are necessary to support a judgment in its favor.

[2]Even if we are wrong in this latter respect, it would not affect the Court's jurisdiction to consider and rule on petitioner's claim's on the merits, which is advanced in defense of the part of the district court judgment favorable to petitioner, but would only affect the disposition of the case; that is, it might require affirmance of that part of the district court's judgment adverse to petitioner.

Because petitioner's predecessor took no position on the merits in the court of appeals, it is a somewhat more difficult question whether the Court should consider petitioner's argument as a matter of sound practice. We believe that it should. The general rule that the Court will not consider claims not presented in a lower court is based on principles of sound administration, but it is not jurisdictional and it is not inflexibly applied. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976), and authorities cited. It should not bar consideration of petitioner's claims because those claims were presented to and decided by the court of appeals on the Secretary of HEW's appeal from the part of the judgment in favor of the patients. This constituted an adequate representation in the court of appeals of the position petitioner now takes in this court.

There is no merit to the Patients' further claim (Br. 22-25) that the Court may not consider the claims of the Secretary of HEW and may not reverse the judgment of the court of appeals adverse to the Secretary. In this case, the court of appeals issued a single judgment against petitioner and the Secretary of HEW (Pet. App. 30a), and, as we stated in our opening brief (page 19 n.28), this Court's rules contemplate that appellees and respondents can join appellants or petitioners in urging reversal of judgments without filing duplicative appeals and petitions so long as the grounds on which they seek reversal were presented in the jurisdictional statement or petition for certiorari and were adequately preserved below. See Rules 10(4), 21(4).[3]

[3] *Ryerson* v. *United States*, 312 U.S. 405, 408 (1941), and *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940), on which Patients rely (Br. 25), are not to the contrary. Those decisions merely involve the established rule that an appellee or respondent may not, without filing a separate appeal or petition for a writ of certiorari, seek relief that would alter the judgment below and that is beyond the scope of relief sought in the initial appeal or petition. They do not establish that every party who is aggrieved by a judgment in the same way as the initial appellant or petitioner must file separate and duplicative appeals or petitions in order to challenge the judgment below on the same grounds. See HEW Br. 19 n.28.

The Patients also contend (1) that their complaint never sought relief against the Secretary of HEW and they do not now seek relief against the Secretary (Br. 20, 25) and (2) that the judgment of the district court did not run against the Secretary (Br. 22, n. 25). The second claim is incorrect. The district court's final judgment provided that the defendants (including the Secretary of HEW) shall " 'not withhold payments for services actually provided to patients.' "[4] Moreover, the court of appeals also ordered injunctive relief against the Secretary of HEW (Pet. App. 29a).

The Patients' claim that they never sought relief against the Secretary of HEW is puzzling. The single complaint in this case was filed on behalf of Town Court Nursing Center, Inc., and six of its patients (respondents here) and named as defendants both Frank S. Beal (petitioner's predecessor as Secretary of Public Welfare of Pennsylvania) and the Secretary of HEW. Although the count of the complaint relating specifically to the patients was entitled "(Emma Cooper, et al. v. Beal)," it asserted a right to a hearing only under federal regulations and the federal Constitution (A. 10a-11a). Furthermore, the

[4] It is true that under the statutory mechanism of the Medicaid program, the state agency directly pays participating nursing homes for services provided to eligible Patients, and the federal government reimburses the states for a portion of those payments. But the order of the district court is not limited to enjoining the state defendant from withholding state payments to the home; it appears also to enjoin the federal defendants from withholding federal reimbursements to the state for such payments.

complaint's single prayer for relief stated that "plaintiffs request * * * the following preliminary and permanent relief against the defendants herein * * *" (A. 12a), and the Patients have never suggested in their briefs to the district court or the court of appeals that their complaint sought relief only against the state defendant. Certainly those courts assumed the contrary.

If the Patients' present assertions about the intended scope of their complaint were accepted -and we see no reason not to accept them -it would not follow (as the Patients contend (Br. 25)) that the Secretary of HEW is precluded from seeking reversal of a judgment that is binding upon her. Instead, the correct disposition should be for this Court to direct the lower courts to vacate any judgment against the Secretary of HEW simply because the complaint never sought such relief. Under that disposition, however, the Court would still have to resolve petitioner's claims on the merits; and, as a respondent in the case, the Secretary of HEW may under the Court's rules present arguments in support of petitioner's contention that the judgment of the court should be reversed. See page 4, *supra*.

2. Amici Legal Aid Society of New York City, et al., argue that the writ of certiorari should be dismissed as improvidently granted because the reviewability of petitioner's claims is questionable and because HEW intends to institute rulemaking with respect to the participation of nursing home patients in the termination process (Br. 7-31). Those considerations do not warrant dismissal of the writ.

If the Court agrees with our submission that its review of petitioner's claim is not precluded by jurisdictional or prudential considerations, the fact that their reviewability may be open to some question provides no reason for

dismissing the writ. The court of appeals has entered a judgment against petitioner and the Secretary of HEW on the basis of its lengthy analysis of statutory and constitutional questions that are recurring and important and as to which there is some conflict of opinion among the courts of appeals (see HEW Br. 32-33 & n.42). Those questions are clearly presented and their importance is not diminished by any uncertainty about petitioner's ability to present her claims.

Nor is the importance of the question diminished by the fact that HEW intends to institute rulemaking with respect to patient participation. First, the constitutional theory adopted by the court of appeals has implications reaching far beyond the administration of the Medicare and Medicaid statutes (see HEW Br. 29-32). It is, moreover, important that an agency considering rules and procedures in this area be able to weigh and resolve all of the relevant policy considerations free from a judicial order based on an erroneous theory of the agency's constitutional obligations (see HEW Br. 37-41).

3. On the merits of the constitutional issues presented for this Court's review, the Patients argue (Br. 26-33) that, apart from whatever rights the federal statutes and regulations may provide, Medicaid patients have a "property" interest in continued residence in the nursing home of their choice based on state statutes and based on their state law rights as third party beneficiaries to contracts between the state agency and their nursing home. These claims are insubstantial.

First, the state Medicaid statute and regulations cited by respondents provide no different or greater rights (or legitimate expectations of entitlement) to Medicaid patients than the federal statutes and regulations

discussed in the various opinions of the court of appeals.[5] Respondents do not assert or identify any difference in the rights provided by the two statutory schemes, and for the reasons fully discussed in our opening brief, neither provides patients with a legitimate claim of entitlement to continued residence in the nursing home of their choice.[6]

The Patients' attempt to find protected property rights in the contract between the state agency and the nursing home is equally unpersuasive. A contract between a citizen and the state may create "property" rights protected by the due process clause (see, *e.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 601-602 (1972)). Furthermore,

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[5]Perhaps for that reason the state program was not separately discussed in the court of appeals' opinions. Another reason may have been that respondents did not rely on them. Neither the complaint nor plaintiffs' briefs in the district court made any reference to state law claims. Although their reply brief in the court of appeals generally asserted that petitioner's predecessor had an obligation based on state law independent of any obligation of the Secretary of HEW (see C.A. Reply Br. 8-9; see also *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 266, 279 (3d Cir. 1978)), the brief provided no analysis of any state statutes and made no attempt to show that that they provided greater property rights to Medicaid patients than do the federal statutes or regulations. Moreover, the Patients placed no reliance whatever on the contracts between the nursing home and the state agency.

[6]Amici Legal Aid Society of New York City et al. suggest, as an alternative to dismissal of the writ, that this Court vacate the judgment below and remand the case to the court of appeals to consider these allegedly adequate state grounds (Br. 27-31). In our view such a remand would be unwarranted because the state law grounds are manifestly insubstantial. Furthermore, little benefit (and considerable delay) could be expected from a remand to allow the court of appeals to consider state law questions that the Patients failed adequately to present in their initial appeal. Since the state statutes and regulations largely parallel the federal scheme, the court of appeals would be likely to conclude that the state scheme also established protected property rights under the same analysis employed in the opinions below. For the same reasons argued in our present briefs, we and petitioner would still contend that any such conclusion was error under established principles.

we may assume the Patients' premise that the rights of a third party beneficiary may also constitute protected property rights, although the proposition seems questionable. But in order to show a deprivation of property rights triggering the procedural protections of the Due Process Clause, a person must still show a breach *by the state* of *his* rights under the contract, or of contract provisions adopted for his benefit. Respondent patients have shown no such breach. They have referred generally to the contract between the state agency and the nursing home and have asserted their rights as third party beneficiaries, but they have identified no contract provision and have pointed to no breach.

In fact there has been no breach by the state agency of any provision of the agreement that might arguably vest rights in the patients. The standard agreement (set forth in Patients' Br. A24-A29) obligates the nursing home to meet federal and state health and safety standards and comply with a number of other requirements. It requires the state agency to undertake several actions, including making payments to the home in accordance with its regulations, determining patient eligibility, and assisting in transferring patients (*id.* at A28). It also provides, however, that "[f]ailure by the Nursing Home to comply with laws or regulations shall entitle the Department to terminate the Agreement forthwith" (*id.* at A28) and that "[t]his Agreement may be terminated by either party upon 30 days advance written notice" (*id.* at A29). In this case, the state agency properly exercised its termination rights under the contract and respondents have made no showing, or even claim, that it did not. It may be that the nursing home's failure to comply with the agreement (*e.g.*, to comply with state and federal standards) would constitute a breach for which patients could sue the *home* as third party beneficiaries if they were injured by such a

breach,[7] but that would not establish any deprivation of contract or "property" rights by the state that would require the state to provide notice and hearing under the Due Process Clause. In short, the Patients cannot prevail simply by asserting the existence of a contract to which they are allegedly third party beneficiaries and without any analysis of the contract provisions relied on.[8]

4. The Patients and *amici* supporting them contend that the court of appeals correctly concluded that the Medicaid statutory and regulatory scheme gives Medicaid patients a legitimate expectation of entitlement to receive covered care from the nursing home of their choice and thus to contest any decision to terminate the home's program participation in an evidentiary hearing (see Patients Br. 30-35; Legal Aid Society of N.Y. City Br. 43-55; National Citizens' Coalition Br. 16-23). In our opening brief we have demonstrated that the statutes and regulations do not entitle patients to receive covered care from a home found to be unqualified by HEW and the responsible state agencies and that they give give patients no right to a hearing on the qualifications of the home (Br. 26-29). We also argued that under the court of

[7]Indeed, all the cases cited by the Patients in support of their third party beneficiary theory (Br. 26-30) are cases in which the third party beneficiaries have sued private parties, including nursing homes, for breaches of agreements between the private party and the state.

[8]Amicus National Citizens' Coalition for Nursing Home Reform relies on an even more tenuous source of "property" rights –the contract that some nursing homes have with their patients (Br. 14-15). A simple breach of contract by a private party is not governmental action to which the Due Process Clause applies. More important, the patients here are not complaining about any actions by their nursing home but are challenging actions of the state agency, and perhaps HEW (see pages 5-6, *supra*). Any contracts between patients and their nursing homes have no relevance to such actions.

appeals' apparent constitutional theory, persons would have due process rights with respect to a host of governmental actions directly affecting the rights of other persons and having only an indirect effect on the interests of the persons claiming the right. For example, it would give a person a right to be heard in a proceeding to delicense or disbar the physician, pharmacist, or attorney of his choice because of professional incompetence (Br. 30).

The Patients and *amici* have offered nothing to rebut our view of the statutes and regulations. Moreover, that view has been HEW's consistent view in this and other cases. Hence, even if the question were subject to doubt, it is well settled that an agency's interpretation of its statutes and regulations should be accepted if it is reasonable. See, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978). Nor do the Patients and *amici* appear to deny, or seriously contest, the significant implications that would follow from their constitutional theory in many other contexts.[9]

[9]Amicus National Citizen's Coalition For Nursing Home Reform suggests (Br. 34) that Medicare and Medicaid programs are different because the main purpose of those programs is to benefit patients, but that is hardly a satisfactory basis for distinction. For example, the principal purpose of most professional licensing programs and delicensing procedures is to protect patients and clients of professionals. There are also many other contexts in which the government regulates or has contractual relationships with certain persons for the principal purpose of protecting or benefiting other persons. Yet, as we argued in our opening brief, government could hardly function if, in taking action directly against one person, it had to provide notice and evidentiary hearings to all other persons who are affected by the action and whom the government had a general intention to benefit.

5. Patients and *amici* contend that a decision to terminate a nursing home's participation in the Medicare and Medicaid programs does result in a direct reduction of benefits to which Patients are statutorily entitled: they argue that practical effect of termination is to cause "transfer trauma" to Patients and that their statutory benefits are thus reduced by the amount of this psychological injury (Patient's Br. 46-48; National Citizen's Coalition Br. 26-28). The court of appeals did not reach this contention (see *Klein* v. *Califano*, *supra*, 586 F. 2d at 259 n.16; HEW Br. 27 n.37) and it is without merit. The benefits that these statutes and regulations (like most, if not all, welfare programs) grant to eligible recipients are monetary, not psychological benefits. The "transfer trauma" argument is simply another way of arguing that the procedural protections of the Due Process Clause turn not upon the nature of the rights in question but upon the magnitude of the impact of governmental action upon a person—an argument that this Court has consistently rejected. See, *e.g.*, *Greenholtz* v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979), slip op. 5; see generally HEW Br. 23-26).

6. Finally, the Patients and *amici* argue that even if a decision to terminate a nursing home does not implicate the "property" rights of patients, it implicates their "life" and "liberty" interests (Patients Br. 35-40, National Citizens' Coalition Br. 5-16). This argument is based on the contention that the practical effect of a termination decision is that most Medicaid patients must transfer to qualified homes in order to receive covered care, and that such transfers threaten the lives of many elderly and infirm patients and disrupt the associational ties developed in the terminated home. We do not belittle the serious consequences that may attend a termination

decision.[10] Because of those consequences, HEW and state agencies devote a very substantial part of their administrative efforts, first, to bringing nursing homes into compliance with health and safety standards without termination, and, failing that, to relocating patients to other qualified homes. But there is no merit to the contention that governmental decisions implicate "life" and "liberty" interests—any more than they implicate "property" interests—simply because their incidental effects are asserted to enhance the risk of death or to sever associational ties. Innumerable governmental decisions may be reasonably asserted to have such effects—from designing highways and establishing speed limits to condemning apartment buildings—but no one could seriously contend that every motorist, apartment resident, or neighborhood friend has a constitutional right to notice and an evidentiary hearing before such decisions can be made. As this Court stated in *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, slip op. 5: "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protections."

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[10]We note, however, that the extreme assertions by the Patients and amici about the life-threatening consequences of transfers do not reflect the unanimous opinion of the profession. Indeed a recent review of the studies on this matter concludes that:

> [T]he findings have been ambiguous and appear to be contradictory.
>
> Six studies have found that the effects of relocation resulted in an increase in mortality rates * * *.
>
> On the other hand, 12 studies found that relocation had no significant effect on patient mortality rates * * *.
>
> One study found the relocated group had a significantly lower death rate * * *. Borup, Gallego, and Hufferman, *Relocation and its Effect on Mortality*, The Gerontologist, Vol. 19, No. 2, page 136 (1979).

CONCLUSION

For the reasons stated herein and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1979

DOJ-1979-11

Supreme Court, U. S.
FILED
JUL 25 1979
MICHAEL RODAK, JR., CLERK

No. 78-1318

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

HELEN B. O'BANNON, SECRETARY OF
PUBLIC WELFARE, PENNSYLVANIA, PETITIONER

v.

TOWN COURT NURSING CENTER, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR JILL HARRIS AND THE RESIDENTS OF EDGEFIELD MANOR IN SUPPORT OF RESPONDENTS

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SUBJECT INDEX

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
STATEMENT OF THE CASE	3
A. Jill Harris	4
B. The Residents of Edgefield Manor	9
SUMMARY OF ARGUMENT	18
I. TITLE XIX REGULATIONS CREATE A "LEGITIMATE EXPECTANCY"	27
II. TRANSFER TRAUMA MANDATES DUE PROCESS PROTECTION FOR LIFE AND LIBERTY	35
A. That Involuntary Transfers Are Life-Threatening Triggers the Protections of Due Process	36
B. That Involuntary Transfers Violate Associational Interests Triggers Due Process	41
III. STATUTORY BEST INTEREST REQUIREMENTS DEMAND A HEARING	56
IV. TRANSFER TRAUMA AND BEST INTEREST CONSIDERATIONS REQUIRE A PRIOR EVIDENTIARY HEARING	65

Page

A. The Individuals' Interests Are Compelling 68

B. The Risks of Error and Need for Additional Safeguards Are Demonstrated by Petitioners' Arguments. 72

C. Burden Cannot Justify Foregoing Critical Inquiries. 79

D. A Prior Hearing and Adequate Notice Are Required 82

CONCLUSION 83

APPENDIX 1:
Letter from Rose Haven Nursing Facility. 1-1

APPENDIX 2:
Summary of Relocation Literature. 2-1

APPENDIX 3:
Excerpt of Oregon Legislative Testimony 3-1

TABLE OF AUTHORITIES

- Cases -

Page

Aitchison v. Berger, 361 F. Supp. 1137 (S.D.N.Y. 1975). 32

American Federation of State, County, and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969). 44

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 42

Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D. N.C. 1969) 44

Bell v. Hood, 327 U.S. 678 (1946) 78

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 30

Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978) 27, 35

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964). 43

Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970) 51

Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971). 32

Page

Bumpus v. Clark, 9th Cir. No. 77-2883. . . . . 2, 10

Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973). 28

Califano v. Westcott, 47 U.S.L.W. 4817 (June 25, 1969). 32

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Cannon v. University of Chicago, ___ U.S. ___, 99 S.Ct. 1946 (1979) 34

Caramico v. Secretary of the Dept. of HUD, 509 F.2d 694 (2d Cir. 1974) 28

Carleson v. Remillard, 406 U.S. 598 (1971). 31, 33

Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977) 33

Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973) 46

Eisenstadt v. Baird, 405 U.S. 438 (1972) 46

Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) 28

Feld v. Berger, 424 F. Supp. 1356 (S.D.N.Y. 1976) 28, 59 n.1

Page

Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972). 44-45

Fuentes v. Shevin, 407 U.S. 67 (1972). 29

Gardner v. Parry, 88 Misc.2d 154, 386 N.Y.S.2d 322 (S.Ct. 1976) 27, 35

Gay Students Organization of University of New Hampshire v. Bonner, 507 F.2d 652 (1st Cir. 1974). 51

Geneva Towers Tenant Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974) 28

Gilmore v. City of Montgomery, Alabama, 417 U.S. 556 (1974) . . . 51-52

Goldberg v. Kelly, 397 U.S. 254 (1970) 58, 66, 80-81, 82, 83

Griswold v. Connecticut, 381 U.S. 479 (1965). 46

Harris v. Rose Haven, 9th Cir. No. 78-1846. . . . . 1, 5

Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976). 28

Johnson v. Zerbst, 304 U.S. 458 (1938) 38

Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973). 28

Page

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King v. Smith, 392 U.S. 309 (1968) 31-32

Klein v. Califano, 586 F.2d 250 (3d Cir. 1978) 27, 35, 49

Klein v. Mathews, 430 F. Supp. 1005 (D.C. N.J. 1977), aff'd sub nom., Klein v. Califano, 586 F.2d 250 (3d Cir. 1978) 35, 49, 62-63

Lontine v. VanCleave, 483 F.2d 966 (10th Cir. 1973). 44

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Mabra v. Schmidt, 356 F. Supp. 620 (W.D. Wis. 1973) 51

Mathews v. Eldridge, 424 U.S. 319 (1976) 24, 66, 73, 81, 82

Meachum v. Fano, 427 U.S. 215 (1976) 38

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) 28, 29, 30, 66, 82, 83

Mendoza v. Lavine, 412 F. Supp. 1105 (S.D.N.Y. 1976) 32

Page

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 49-51, 53-54

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 52

Moreno v. United States Department of Agriculture, 345 F. Supp. 310 (D. D.C. 1972), aff'd, 413 U.S. 528 (1973) 46-47

Morrissey v. Brewer, 408 U.S. 471 (1972). 54-55

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) 83

NAACP v. Button, 371 U.S. 415 (1963) 43

National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). 54

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). 34

Parham v. J. L. and J.R., ___ U.S. ___, 47 U.S.L.W. 4740 (June 20, 1979) 66, 73, 82

Poe v. Ullman, 367 U.S. 497 (1961) 53

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Page

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Rosado v. Wyman, 397 U.S. 397 (1970) 31

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Smith v. Vowell, 379 F. Supp. 139 (W.D. Tex. 1974), aff'd, 504 F.2d 759 (5th Cir. 1974) 33

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Sniadach v. Family Finance Corp., 397 U.S. 337 (1969). 34

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Stitt v. Manor Care, Inc., CCH Medicare & Medicaid Guide, ¶ 29,409 (N.D. Ohio, Oct. 24, 1978) 27-28, 35

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Thomas v. Collins, 323 U.S. 516 (1945) 44

Townsend v. Swank, 404 U.S. 282 (1971) 31, 33

Trop v. Dulles, 356 U.S. 86 (1958) 41

Page

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- Statutes -

42 U.S.C. §§ 601, et seq. 31

42 U.S.C. §§ 1396, et seq. 31

42 U.S.C. § 1396a. 59

42 U.S.C. § 1396a(a) . . . . . 1, 5, 20, 22, ... 56-61, 81

42 U.S.C. § 1396c. 59

Page

- Regulations -

42 C.F.R. § 449.10 31

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Page

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Page

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INTEREST OF AMICI

Both Jill Harris and the Residents of Edgefield Manor are appellants in cases pending before the United States Court of Appeals for the Ninth Circuit; both assert that the trial court erred in refusing to recognize their rights, as title XIX nursing home residents, to hearings prior to involuntary transfers.

Jill Harris is plaintiff and appellant in JILL HARRIS vs. ROSE HAVEN, INCORPORATED, 9th Cir. No. 78-1846. She appeals from an order denying a preliminary injunction to forbid her transfer absent a hearing at which she could contest the provider's determination that a transfer was for "medical reasons or for [her] welfare" (42 C.F.R. § 449.12(a)(1)(ii)(B)*(4)*), and at which she could demonstrate that the transfer is contrary to her best interests in violation of 42 U.S.C. § 1396a(a)(19).

The Residents of Edgefield Manor are certified as class plaintiffs and are the appellants in ALTA BUMPUS, et al., vs. DONALD E. CLARK, et al., 9th Cir. No. 77-2883. They commenced the action as a result of the announcement of Multnomah County, Oregon, that their county-run nursing home would be closed and all residents transferred. The Residents of Edgefield Manor assert that a variety of regulatory, statutory, and constitutional provisions limit the county's ability to subject them to life-threatening transfers. Even if the county may, under some circumstances, transfer the residents, the residents contend that they must be afforded individual hearings to determine whether a transfer is consistent with the "best interests" requirement in each case, or at least to ensure that each transfer is arranged consistently with each resident's best interests in terms of medical needs,

visitation opportunities, and associations with other residents and staff.

As a practical matter, this Court's disposition of Town Court may well determine the fate of amici's appeals, and, in turn, whether the Residents of Edgefield Manor will have to endure involuntary transfers. As Jill Harris alleged, and as the Residents of Edgefield Manor proved through massive and uncontradicted expert testimony, an involuntary transfer may well prove deadly to as many as half of them.

Accordingly, the interest of amici is that their very lives may be at stake.

STATEMENT OF THE CASE

Although the facts of amici's cases are not otherwise of record before this Court, those facts dramatically illustrate both the interests typically affected by any involuntary transfer of a nursing home resident, and the fact issues inherently

critical to every determination of whether to precipitate or to permit such a transfer. Since this Court's resolution of the legal issues in Town Court will necessarily affect the hearing rights of Medicaid recipients in circumstances like those of amici, amici submit that it is appropriate to relate those circumstances to this Court.

A. JILL HARRIS

Jill Harris resided at Rose Haven Nursing facility as an Intermediate Care Facility (ICF) Medicaid recipient. Throughout her stay there, she received visits at least daily from her husband or from her daughter or son-in-law, who had relocated to Roseburg, Oregon, when Mrs. Harris first became ill. Mrs. Harris also received visits from church friends several times each week.

In March of 1978, Rose Haven determined that caring for Mrs. Harris was

causing "excessive" demands on its staff, and asked the state Welfare Division to arrange a transfer to a Skilled Nursing Facility (SNF). Committed to the position that no notice or hearing rights exist, the Welfare Division arranged to transfer Mrs. Harris to a SNF in Coos Bay, Oregon, some 2-1/2 hours away from her friends and relatives in Roseburg. The Coos Bay facility was undergoing decertification proceedings for patient care violations at the time. The proposed transfer was aborted by the filing of Harris v. Rose Haven.

In that case, Mrs. Harris contended that she was entitled to a hearing before any involuntary transfer, and that the transfer was not for her welfare as required by 42 C.F.R. § 449.12(a)(1)(ii)(B)(4) and contrary to her best interests in violation of 42 U.S.C. § 1396a(a)(19).

Treating the plaintiff's application for a temporary restraining order as a motion for preliminary injunction, the trial court heard testimony by telephone conference call. The doctor, who one day prior to the filing of the lawsuit had written a letter stating that Mrs. Harris' care at Rose Haven was "adequate," testified that a transfer to a skilled facility was necessary because she needed almost continuous monitoring, that she required a nurse call device she could operate, and that she needed heavy medical care.

On cross examination, however, the doctor conceded that he was ignorant of which services and personnel were required of an intermediate care facility and which were available only at a skilled facility, that he was unfamiliar with transfer trauma, and that he was unaware of the extent to which plaintiff's family members contributed to her physical therapy. He also acknowledged

that her family's visits were "very helpful to her" and that the transfer would be emotionally traumatic.

Rose Haven's director of nursing testified that the facility sought the transfer because caring for Mrs. Harris caused excessive demands on the staff, because of the nursing call device, and because Mrs. Harris needed whirpool therapy five days a week instead of three -- a need not identified by the doctor.

The Manager of the state welfare program responsible for nursing homes testified that of all the needs identified by the doctor and Rose Haven's director of nursing, none justified a transfer other than the need for whirlpool therapy five days a week. The Manager explained that the call light should be the same at an ICF as at a SNF, and that all of the identified needs were required to be met at an ICF except the five days of whirlpool

therapy. She also testified that most doctors were ignorant of the distinctions between ICF and SNF care requirements.

The trial court agreed that only whirpool therapy justified the transfer, and denied the preliminary injunction. Two days later, the defendants arranged for Mrs. Harris' transfer to a SNF 96 miles from her home community -- even though the home they selected had no whirlpool facilities. It subsequently came to light that the state agency had discontinued whirlpool therapy authorization as contraindicated for Mrs. Harris well before the intitial transfer decision.

Mrs. Harris has contended throughout the litigation that the real reason for her transfer -- and that of four others -- was that Rose Haven wanted to rid itself of heavy care patients to maximize its profit, even though SNF-level care was unnecessary. See Appendix 1 (letter from

Rose Haven: "Any welfare patient that requires an excessive amount of nursing staff time will be transferred . . ."].

Mrs. Harris' appeal from the order denying the preliminary injunction has been briefed before the Ninth Circuit Court of Appeals. No argument date has been set.

B. THE RESIDENTS OF EDGEFIELD MANOR

Edgefield Manor is a title XIX Intermediate Care Facility owned and run by Multnomah County. For many years, Edgefield Manor has been one of the best nursing homes in Oregon. In February of 1975, the county announced plans to close the facility and to move the residents into private homes throughout the state. By spring of that year, however, the county rescinded the announcement when its plans went awry: the private nursing home operator who figured prominently in the

plans was found to have committed fraud in obtaining his state license, and Edgefield staff voiced growing alarm at the numbers of residents who were dying or falling ill in apparent response to the impending closure.

When the county renewed its closure plans in early 1976, and Edgefield staff again reported apparently related mortality and morbidity among residents, the residents filed Bumpus v. Clark, contending that a variety of constitutional and title XIX provisions entitled them to prevent life-threatening transfers, or at least entitled them to hearings prior to transfers -- either to resolve whether involuntary transfers were permissible or to determine the rights of each resident to accommodation of individual needs for medical services, proximity to regular visitors, and retention of critical relationships with staff and other residents.

The Residents of Edgefield Manor based their contentions upon associational interests, rights of privacy, the due process protection of life and liberty, title XIX best interest requirements and regulatory transfer limitations, and both due process and regulatory hearing rights.

The case was resolved at the trial level on the motions of the state and county defendants to dismiss the action and on the plaintiffs' cross motion for partial summary judgment.

In support of summary judgment, the Residents of Edgefield Manor presented the results of substantial discovery. In addition to affidavits from residents, their friends and relatives, staff members, and a psychiatric consultant, the plaintiffs presented depositions of county and state officials, Edgefield's administrator, and the doctor most familiar with Edgefield's residents, as well as an extensive

deposition of the county's transfer trauma expert responsible for minimizing the harm to be caused by the move. In the latter deposition, the expert discussed most of the existing literature on transfer trauma, and explained the testing he administered to determine the risk of transfer to the residents. Plaintiffs also presented affidavits of national transfer trauma experts commenting on the risks and on the results of the county expert's tests. Finally, the plaintiffs presented a summary of transfer trauma literature.

The state and county defendants made no attempt to dispute the plaintiffs' showing of the nature, source, and extent of harm a transfer would threaten; the county's expert essentially agreed with the residents' position on the facts. The trial court dismissed on the theory that it was without power to prevent the harm the plaintiffs proved would accompany a transfer.

What follows is a description of the uncontroverted evidence offered by the Residents of Edgefield Manor, as it relates to the issues before this Court. Appendix 2 is a summary of the transfer trauma literature similarly edited.

The Residents of Edgefield Manor have replaced the family and community relationships of the outside world with a social fabric consisting of long-standing and family-like relationships with staff and other residents. Although some are still fortunate enough to enjoy regular visits from relatives, most are heavily dependent for their medical and psychological well being upon relationships they have built up within the institution -- relationships which are fully equal in emotional significance to parent-child and/or sibling relationships, depending upon the physical and cognitive condition of each resident.

The relationships enjoyed by the residents are critical to their ability to preserve a sense of dignity and privacy, particularly for those who are incontinent or otherwise dependent upon staff members for personal hygiene. It is the loss of such relationships which is apparently the major factor in the phenomenon known as transfer trauma.

As set forth more fully in Appendix 2, "transfer trauma" describes the correlation between transfers of institutionalized elderly and dramatic increases in death rates and illness among those transferred. The county's expert studied the literature on transfer trauma and administered a series of tests to ascertain the residents' chances of surviving a transfer in view of the physical and cognitive conditions which correlate with high death rates in the existing transfer studies. The tests reflected that the residents were infirm,

elderly, and variously afflicted with heart disease, stroke disorders, chronic brain syndrome, incontinence, cognitive impairment, and other disabilities which render them extremely vulnerable to death as the result of an involuntary transfer. The expert concluded that 75% of the residents were "at high risk" in terms of their vulnerability to transfer trauma, and projected over a three-fold increase in mortality within three months following a move.

As noted in Appendix 2, mortality rate increases to eight or nine times normal have been recorded. Professor Morton Lieberman, whose studies form a substantial portion of the existing literature, reviewed the county expert's test results. Professor Lieberman agreed that the high risk patients were correctly identified by the tests, and submitted an affidavit expressing the opinion that

transferring nursing home residents with such physical and cognitive impairments "entails a mortality risk of over 50 percent."

The evidence produced by the Residents of Edgefield Manor proved without contradiction that an involuntary transfer without the staff might well kill one third to one half of those residents. The doctor familiar with the residents predicted, based upon his previous experience with transferred nursing home residents, that ambulatory patients would become bedridden, and deaths would follow from pneumonia and exacerbated cardiac conditions as fluids accumulate; that stroke patients would suffer further loss of functioning; chronic brain syndrome patients would "just quit;" and that medical conditions would decline in general.

All transfer trauma witnesses, including the county's expert, agreed that there is a powerful connection between the termination of associations among patients and

between patients and staff and mortality risks accompanying a transfer. All acknowledged that the only successful transfers of comparable populations were accomplished by moving the staff with the patients. See Appendix 2. All agreed that the same debilitation which places patients at risk for purposes of transfer trauma also makes them heavily dependent upon interpersonal relationships. All accepted the formulation of Professor Lieberman that transfer trauma is largely the product of violating associational interests:

> [T]he predominant risk is related to destruction of interpersonal relationships between the patient and other human beings, patients and staff, which relationships comprise the social fabric of which the patient is a part.

Finally, all witnesses who addressed the issue, including the county's expert and the residents' doctor, agreed that a

move would be contrary to standards of due care and violative of the residents' best interests.

The residents' appeal from the trial court's judgment of dismissal, and the denial of their motion for summary judgment, is presently pending before the Ninth Circuit Court of Appeals. The plaintiffs continue to reside at Edgefield Manor, and await an argument date although the case has been fully briefed for over a year.

SUMMARY OF ARGUMENT

Although amici support the Third Circuit's position that provisions assuring a free choice of title XIX providers, limiting nursing home transfers, and establishing hearing rights evidence a sufficient "expectancy" to require the application of due process, amici submit that the implications of transfer trauma

and the statutory requirement that Medicaid services be provided in a manner consistent with the best interests of recipients greatly strengthen the conclusion that hearing rights exist and bear heavily upon what process is due.

Transfer trauma in fact kills many nursing home residents who are moved against their will, whether or not the move is occasioned by a decertification, and whether or not the move is intended to serve the residents' welfare. Regardless of whether statutes and regulations create an expectancy sufficient to trigger the "property" facet of due process, transfer trauma requires the application of due process because due process protects "life, liberty and property."

Because transfer trauma occurs primarily as a result of the destruction of interpersonal relationships between residents and relatives, friends, and staff

members, and among residents, and because such associational interests fall within the ambit of the "liberty" facet of due process, involuntary transfers would require due process rights even if life and property were not at stake.

Title XIX statutes require "such safeguards as may be necessary to assure that . . . care and services . . . will be provided in a manner consistent with simplicity of administration and the best interests of the recipients." 42 U.S.C. § 1396a(a)(19). Apart from the regulatory bases of an expectancy in continued residency at any particular institution, the best interests statute creates an expectancy that benefits will be delivered in a manner consistent with the resident's best interests. Because transfer trauma poses a real and substantial threat to the lives and well being of title XIX recipients, the "property" right to benefits consistent

with a recipient's best interests is at stake in every involuntary transfer dispute.

The statutory best interest guarantee also provides a complete answer to the suggestion that the regulatory transfer restrictions apply only against the provider and that residents' interests in decertification are "vicarious," as the best interest requirement clearly runs in favor of residents and against HEW and the state agency responsible for administration of the title XIX plan.

Moreover, the best interest statute forecloses any rejection of the regulatory hearing right argument on the theory that a transfer involves no "reduction" in benefits for purposes of 45 C.F.R. § 205.10. Given the allegation that an involuntary transfer may be deadly or at least severely violative of the right to receive benefits consistent with a recipient's best interests, an involuntary

transfer -- even to a purportedly higher level of care -- can easily constitute a reduction in benefits consistent with the recipient's best interests.

Independently of 45 C.F.R. § 205.10, rights to a hearing are in fact essential as "safeguards which [are] necessary to assure that . . . care and services will be provided in a manner consistent with . . . the best interests of the recipients." 42 U.S.C. § 1396a(a)(19). Transfer trauma must be weighed against factors favoring decertification or transfer to determine whether decertification is in fact consistent with a recipient's best interests. Even if an individual or decertification transfer is unavoidable, the best interest requirement dictates that transfer trauma be minimized by reducing interference with associational interests as much as possible and by other means typically peculiar to each individual resident, his or her medical

and cognitive condition, and his or her interpersonal relationships. Amici submit that because hearing rights are essential to assuring that transfer trauma receives adequate attention in both determinations -- whether and how to move -- the best interest requirement demands hearing rights by its own force.

Transfer trauma and best interest considerations also bear heavily upon what process is due. Because life itself is at stake, a resident opposing a transfer decision must have the opportunity to address the ultimate issue of whether the cause for an individual or decertification transfer exists and, if so, whether the harm threatened by the transfer is worse than that threatened by the basis of the transfer -- and whether means less onerous than a transfer exist to remedy the situation. In short, a resident must have a meaningful opportunity

to address all aspects of whether the transfer is in fact consistent with his or her best interests.

This determination potentially involves medical and expert evidence. But, unlike the Mathews v. Eldridge context, where the relevant agency and its experts are both neutral and fully equipped to determine the existence vel non of a disability, the context of an involuntary transfer offers neither of these justifications for deference to a medical bureaucracy. In an individual transfer context, medical evidence cannot be fairly presumed to be neutral, and it is frequently ignorant of regulatory criteria critical to the legality of a transfer; both are dramatically illustrated by the facts of Mrs. Harris' case.

In a decertification context, state and federal bureaucracies have a very real incentive to minimize or to ignore the

implications of transfer trauma because of the administrative burdens which full recognition of the phenomenon represents. Moreover, the personnel responsible for a decertification decision have no direct access to the associational realities of a resident's life or to a meaningful analysis of the risk of trauma particular to a given resident or resident population in light of medical and cognitive condition, interpersonal relations, and other factors affecting risk.

Life is at stake in all involuntary transfer decisions. Although full hearing rights will presumably be invoked only rarely, the nature of the essential evidence and the severity of the consequences of error demand that the right to a full evidentiary hearing, with full opportunity to present medical and other expert testimony, be afforded prior to every involuntary transfer. In a contested decertification

context, a joint hearing would be appropriate, but only full opportunity to present evidence as to the consequences of decertification for each resident can equip a decisionmaker to determine whether decertification is really preferable to the alternative possibilities.

Those possibilities, in a decertification context, are typically these: tolerate continued violation of applicable regulations, or accept the challenge of developing and employing tools such as fines, regulatory orders, implied civil remedies in the nature of injunction, and even receivership, to accomplish compliance without the cost of transfer trauma. It is submitted that only the latter is consistent with the statutory best interest requirement.

I

TITLE XIX REGULATIONS CREATE A "LEGITIMATE EXPECTANCY"

Amici respectfully concur in the Third Circuit's analysis that regulations assuring a free choice of provider, a grievance hearing, and protection against unwarranted transfers evidence a sufficient expectancy to create a due process property interest. Klein v. Califano, 586 F.2d 250, 257-59 (3d Cir. 1978).

Other cases similarly finding that title XIX nursing home residents have pretransfer hearing rights are: Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978); Kane v. Parry, 88 Misc.2d 1019, 371 N.Y.S.2d 605, reversed, 390 N.Y.S.2d 191, 55 App. Div. 678, reversed, 41 N.Y. 2d 1051, 396 N.Y.S.2d 182, 364 N.E.2d 846 (1977); Gardner v. Parry, 88 Misc.2d 154, 386 N.Y.S.2d 322 (S.Ct. 1976); Stitt v. Manor Care, Inc., CCH Medicare &

Medicaid Guide, ¶ 29, 409 (N.D. Ohio, Oct. 24, 1978); Roberson v. Wood, 464 F. Supp. 983 (E.D. Ill. 1979); Feld v. Berger, 424 F. Supp. 1356 (S.D.N.Y. 1976); Yaretsky v. Blum, 592 F.2d 65 (2d Cir. 1979). See also, Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 7-11 (1978); Geneva Towers Tenant Organization v. Federated Mortgage Investors, 504 F.2d 483, 489-91 (9th Cir. 1974); Caramico v. Secretary of the Dept. of HUD, 509 F.2d 694, 700 (2d Cir. 1974); Joy v. Daniels, 479 F.2d 1236, 1241-42 (4th Cir. 1973); Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2d Cir. 1970), cert. denied, 400 U.S. 853 (1970); Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165, 1168-69 (2d Cir. 1973).

Amici have but three points to add to the Third Circuit's analysis. First,

assuming, as does the Third Circuit, that free choice of provider and transfer limiting regulations are not offended by transfers precipitated by a validly adopted decertification order, the expectancy which triggers the requirements of due process is that decertification will only occur when required by the welfare of the residents. See 42 C.F.R. § 449.12(a)(1)(ii)(B)(4). Whether residents' welfare is truly served by decertification transfers is in fact the issue posed by resident objections to decertification; in the words of Memphis Light,

> the Fourteenth Amendment's protection of "property" . . . has never been interpreted to safeguard only the rights of undisputed ownership.
>
> 436 U.S. at 11, quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972)

Second, the regulations are merely evidence of a greater expectancy. See,

e.g., Memphis Light, Gas & Water Division v. Craft, supra, 436 U.S. at 11. The reality is that nursing home residents are in fact dependent upon their institutional environment and whatever family and friends they may have as regular visitors for all the incidents of human relationships. In their day-to-day lives, the institution is their entire world.

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must be arbitrarily undermined.
>
> Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)

Third, the Town Court dissent is incorrect both in reading the transfer limitations as running only against the provider and in concluding from that reading that residents have no due process property interest in continued occupancy.

Title XIX is precisely parallel to categorical welfare programs in that it is a scheme of cooperative federalism under which federal monies are conditioned upon submission by participating states of a detailed "plan" which meets the satisfaction of the Secretary of HEW and fulfills regulatory prerequisites. Compare 42 U.S.C. §§ 1396 et seq. with 42 U.S.C. §§ 601 et seq. Thus the transfer limitations are among the many prerequisites for participation and HEW's approval of a state plan for medical assistance. See 42 C.F.R. §§ 449.10, 449.12. As such, they are directly enforceable by recipients, just as prerequisites to participation in Aid to Dependent Children programs are enforceable by recipients. Compare Stanton v. Bond, 504 F.2d 1246 (7th Cir. 1974), with Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith,

392 U.S. 309 (1968); and Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1971); see T. H. v. Jones, 425 F. Supp. 873, 876-77 (D. Utah 1975) (three judge court); Mendoza v. Lavine, 412 F. Supp. 1105, 1106 (S.D.N.Y. 1976).

Courts have routinely rejected contentions that HEW's power to withhold funds (42 U.S.C. § 1396c) is the sole remedy for noncompliance, and have routinely recognized that title XIX, the plans, and HEW regulations create obligations directly enforceable by title XIX recipients. Califano v. Westcott, 47 U.S.L.W. 4817, 4821 (June 25, 1969); Stanton v. Bond, supra, Yanez v. Jones, 361 F. Supp. 701, 705 (D. Utah 1973); T. H. v. Jones, supra; see Aitchison v. Berger, 404 F. Supp. 1137 (S.D.N.Y. 1975); cf. Bryant v. Carleson, 444 F.2d 353. That HEW has tacitly or expressly approved of the alleged violation does not bar relief. Schaak v. Schmidt, 344 F. Supp. 99, 103 n.5

(E.D. Wis. 1971); T. H. v. Jones, 425 F. Supp. at 879-80; Smith v. Vowell, 379 F. Supp. 139, 161 (W.D. Tex. 1974), aff'd without opinion, 504 F.2d 759 (5th Cir. 1974); cf. Carleson v. Remillard, 406 U.S. at 602-03; Townsend v. Swank, 404 U.S. at 286 & n.3.

When title XIX recipients establish that a participating state is not meeting its title XIX obligations or providing mandated services, they are entitled to an order compelling the state to fulfill its obligations and to provide services. Stanton v. Bond, supra; Smith v. Vowell, supra. Likewise, title XIX recipients can enforce the title XIX requirement that even optional services, if included in the plan, "must be sufficient in amount, duration and scope to reasonably achieve their purpose." Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977); 45 C.F.R. § 249.10(a)(5)(i); see also White v. Beal,

555 F.2d 1146 (3d Cir. 1977).

The fact that a right is created by federal statute does not deprive a party aggrieved by its violation of a remedy against the nongovernmental entity guilty of that violation. See, e.g., Cannon v. University of Chicago, ___ U.S. ___, 99 S.Ct. 1946 (1979).

Even were the Town Court dissent correct in deeming the transfer limitation regulation operative only aginst the provider, it does not follow that the regulation does not evidence a sufficient expectancy to trigger due process. That the governmental action threatening a property interest does not come from the same source as the property itself hardly renders the property beyond the protection of due process. See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Sniadach v. Family Finance Corp., 397 U.S. 337 (1969).

II

TRANSFER TRAUMA MANDATES DUE PROCESS PROTECTION FOR LIFE AND LIBERTY

The trial court in Klein and at least two other courts have suggested that the harm caused by transfer trauma is itself a "reduction in benefits" sufficient to trigger regulatory hearing rights under 45 C.F.R. § 205.10(a). Klein v. Mathews, 430 F. Supp. 1005, 1010 (D.C.N.J. 1977), affirmed, Klein v. Califano, 586 F.2d 250 (3d Cir. 1978); Stitt v. Manor Care, Inc., CCH Medicare & Medicaid Guide, ¶ 29, 409, p. 9110 (N.D. Ohio, Oct. 24, 1978); Bracco v. Lackner, 462 F. Supp. 436, 453 (N.D. Cal. 1978). Accord, Gardner v. Parry, 88 Misc.2d 154, 386 N.Y.S.2d 322 (S.Ct. 1976). Amici concur, but contend that transfer trauma has constitutional significance as well.

Because transfer trauma involves a substantial risk of depriving many typical

nursing home residents of life itself, and because it reflects a grievous violation of associational interests, the "life" and "liberty" interests at stake in a decertification decision require the application of due process even if the title XIX provisions relied upon by the Third Circuit do not reflect a "property" interest, and even if transfer trauma does not inherently constitute a "reduction in benefits."

A. That Involuntary Transfers Are Life-Threatening Triggers the Protections of Due Process.

The Town Court dissent assumed blithely that "although transfer trauma is a legitimate concern for some residents, it is necessarily subordinate to the threat posed to all residents by substandard conditions." 586 F.2d at 296. Unfortunately, the tragic reality is that decertification transfers are fully

capable of inflicting far more damage -- both in extent and in numbers of residents affected -- than even serious violations of patient care standards. As evidenced by the studies collected in Appendix 2 and the testimony presented by the Residents of Edgefield Manor, a transfer may well kill one third, one half, or even a greater proportion of a nursing home population, and substantial medical decline among the survivors has been reported in every study which examined that effect of transfers. Death rates of eight or nine times normal have been observed.

Amici do not suggest that toleration of patient care violations is the necessary consequence of the implications of transfer trauma, or even that decertification is never justified.

They do suggest, however, that the phenomenon demands more creative and recipient-oriented approaches to enforcement

than those encouraged by the premise of the Town Court dissent. More to the point of the issues before this Court, that residents' lives are at stake entitles them to the protections of due process.

Amici acknowledge that "grievous loss" does not itself require the application of due process. Meachum v. Fano, 427 U.S. 215, 224 (1976). Amici submit, however, that the magnitude of the threat to the lives of nursing home residents is more than sufficient to demand the application of due process.

The Fifth and Fourteenth Amendments to the United States Constitution expressly protect the right to life, and this Court has deemed that right fundamental. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

Having recognized that the constitutional right of privacy affords a woman substantial protection in choosing whether to terminate a pregnancy, Roe v. Wade, 410

U.S. 113 (1973), proceeded to reject a state's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." 410 U.S. at 156-59:

> If this suggestion of personhood is established, the appellant's case [in support of abortion], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.
>
> Id. at 156-57, emphasis added

Roe v. Wade precludes any assertion that risking title XIX recipients' lives is constitutionally permissible because the risk is merely "statistical." Roe v. Wade concluded that the state could regulate abortions only after the first trimester of pregnancy because it is at that point that the statistical risk of mortality in abortion overtakes the mortality risk in childbirth. 410 U.S. at 162-64. Again, the court's conclusions that states can

forbid abortions which are not necessary to protect the mother's life or health after viability of the fetus (410 U.S. at 163-65) was fully cognizant of the statistical nature of the determination of viability. See 410 U.S. at 160 and authorities cited nn. 59 & 60. Finally, Roe v. Wade forbids any state to prevent an abortion which is necessary to protect the mother's life or health because of the mother's overriding right to life (see 410 U.S. at 163-65) even though the existence and extent of risk to the mother's life or health must be determined "in appropriate medical judgment" (410 U.S. at 164-65) -- precisely the sort of judgment which predicts dramatic mortality and morbidity increases as a result of nursing home transfers.

Amici submit that due process demands a hearing because life is at stake.

B. That Involuntary Transfers Violate Associational Interests Triggers Due Process.

As reflected in the transfer trauma literature and the undisputed evidence presented by the Residents of Edgefield Manor, it is primarily through destruction of interpersonal relationships that transfer trauma takes its toll. As recognized in the materials summarized in Appendix 2, nursing home residents have replaced the outside world with a substitute social fabric upon which they become dependent for all of their needs, a world consisting of familiar objects and interpersonal relationships; a world which is totally destroyed by the typical decertification transfer. It is the destruction of that world and the extreme "uncertainty, and the consequent psychological hurt" (Trop v. Dulles, 356 U.S. 86, 111 (1958)(Brennan,

J., concurring)) which renders transfer trauma fatal to infirm, elderly residents.

Amici submit that analysis of the associational interests at stake in a transfer decision reveals that the constitutional right to association is directly threatened by involuntary transfers; at the very least, a "liberty" interest is involved which is sufficient to require due process even if the "property" and "life" facets were inapplicable.

The First Amendment guarantees rights of association (e.g., Aptheker v. Secretary of State, 378 U.S. 500, 507 & n.7 (1964), and authorities cited).

Nursing home residents' associational rights rest squarely within two lines of cases protecting distinct nonpolitical associational interests. The first line recognizes the associational implications of helping relationships such as those between union members and their attorney,

among union members themselves, and between private and public social workers and those they serve. The second line ensures protection for family relationships, non-familial living arrangements, and purely social non-familial relationships.

NAACP v. Button, 371 U.S. 415 (1963), held that Virginia's attempts to prevent the NAACP from directing civil rights complainants to attorneys violated the First Amendment right of association. 371 U.S. at 428-29. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964), applied Button to require Virginia to allow a union to channel cases to attorneys it felt competent to represent its members.

This Court followed Button and Trainmen, and expressly denied that associational rights are limited to political circumstances, in United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217 (1967). The opinion noted that the

association protected by Trainmen was "solely designed to compensate victims of industrial accidents. . . ." 389 U.S. at 223.

Thomas v. Collins, 323 U.S. 516 (1945), invoked First Amendment protections to void a court order requiring registration prior to soliciting members for a union.

The Tenth Circuit followed Thomas in holding a deputy sheriff's employment could not be conditioned upon non-membership in a labor union. Lontine v. VanCleave, 483 F.2d 966 (10th Cir. 1973). To the same effect are American Federation of State, County, and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F. Supp. 315 (N.D. Ga. 1971) (three judge court); and Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D. N.C. 1969) (three judge court). See also Franceschina v. Morgan, 346 F. Supp. 833

(S.D. Ind. 1972).

It is submitted that the therapeutic nature of the relationships between staff members and nursing home residents, coupled with the fact that many residents are dependent upon their staff for virtually all of their needs, requires recognition that First Amendment associational interests are threatened by any course of action which will terminate such relationships. If the First Amendment is offended by union organizor registration requirements, First Amendment interests are at least affected by any decertification decision which terminates relationships between patients and staff -- especially since it is primarily termination of those relationships which makes a transfer deadly.

The other major line of First Amendment association decisions which supports Amici's position centers around relationships involving family and friends.

Whatever the ultimate rationale of Griswold v. Connecticut, 381 U.S. 479 (1965), the opinion squarely recognized that social forms of "association" are within the First Amendment's protection. 381 U.S. at 575. In extending Griswold's protection of rights to obtain contraceptives to unmarried couples, Eisenstadt v. Baird, 405 U.S. 438 (1972), noted that a couple is "an association of individuals." 405 U.S. at 453.

Although Griswold and Eisenstadt both involve many constitutional rights, other opinions have focused exclusively on the First Amendment to protect marital and quasi-familial relationships. E.g., Randle v. Indianola Municipal Separate School District, 373 F. Supp. 766 (N.D. Miss. 1974); Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973).

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), affirmed a

decision of a three judge court (Moreno v. United States Department of Agriculture, 345 F. Supp. 310 (D. D.C. 1972)) voiding statutes and regulations denying food stamp eligibility to households of unrelated persons. Although it ultimately relied on equal protection, the district court had invoked freedom of association to reject the Government's assertion of a legitimate interest in regulating morality. 345 F. Supp. at 314. In affirming, this Court cited the district court's freedom of association analysis with apparent approval. 413 U.S. at 535, n.7.

More recently, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977), considered a claim that New York afforded insufficient due process rights when removing a child from a foster home. Reviewing the cases protecting biological families, the court noted:

> [B]iological relationships are not exclusive determination of the existence of a family. . . .
>
> * * * *
>
> [T]he importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association . . . .
>
> 431 U.S. at 843-44, footnote omitted

Smith declined to decide whether foster parents' relationships warranted constitutional recognition notwithstanding the consensually temporary nature of the relationship from its inception and the potentially competing associational interests of natural parents; the Court held New York's procedure adequate in light of those factors assuming arguendo that the foster relationship constituted a "liberty interest." 431 U.S. at 847-56. In contrast, residents' relationships with staff are neither consensually temporary nor in competition with other relationships.

See, e.g., Klein v. Mathews, 430 F. Supp. 1005, 1007-10 (D. N.J. 1977), affirmed, Klein v. Califano, 586 F.2d 250 (3d Cir. 1978).

Although Smith and its authorities focused on nuclear families and child-rearing, there is no room for a suggestion that constitutional protections for "emotional attachments . . . deriv[ing] from the intimacy of daily association" are limited to quasi-parental relationships. Moore v. City of East Cleveland, 431 U.S. 494 (1977), voided an ordinance which limited occupancy of dwellings to nuclear families. In reversing the conviction of a woman whose crime was living with two first cousins who were her grandchildren, a plurality of this Court reasoned:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially

> grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.
>
> 431 U.S. at 504-05, footnote omitted; opinion of Powell, Brennan, Marshall, and Blackmun, JJ.

Traditionally, the extended family was the device by which elders and the disabled received loving care and dignity in their final years. Although modern society has relegated nursing home residents to an institutional substitute for the extended family, many have been fortunate enough to form "emotional attachments . . . from the intimacy of daily association" which

are the equivalent of familial attachments. The "importance of these relationships to the individuals involved and to society" render them "equally venerable and equally deserving of constitutional recognition."

It should not be necessary, however, "to understand every nuance of the human relationships involved" (Mabra v. Schmidt, 356 F. Supp. 620, 635 (W.D. Wis. 1973)), for First Amendment associational protections extend to purely social relationships of far less importance to the persons involved. See, e.g., Gay Students Organization of University of New Hampshire v. Bonner, 507 F.2d 652 (1st Cir. 1974); Wood v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972); Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970).

This Court has expressly recognized that the right of association embraces even purely social relationships in Gilmore v. City of Montgomery, Alabama, 417 U.S. 556,

575 (1974).

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or a woman who his or her associates must be. The individual can be as selective as he desires.
>
> 417 U.S. at 575, quoting dissent of Douglas, J., in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972)

Even if the associational interests at stake in an involuntary transfer decision do not fall within the constitutional right of association, they are necessarily embraced within the "liberty" facet of due process.

Concurring in Roe v. Wade, 410 U.S. 113 (1973), Justice Stewart argued that this Court had ressurected the concept of substantive due process. 410 U.S. at 167-70. To define that concept, Justice Stewart quoted a dissent of Justice Harlan describing

the "liberty guaranteed by the Due Process Clause" of the Fourteenth Amendment as

> not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable search and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.
>
> 410 U.S. at 168-69, quoting Poe v. Ullman, 367 U.S. 497, 543, dissent of Harlan, J.

Justice Stewart's contention was vindicated in Moore v. City of Cleveland, Ohio, supra, which struck an ordinance prohibiting members of an extended family from living in the same single dwelling. Four justices (other than Justice Stewart) adopted Justice Harlan's definition of

substantive due process quoted above to void the ordinance. 431 U.S. at 502. At least five justices of this Court, then, share Justice Harlan's definition of substantive due process.

In Roe v. Wade, Justice Stewart also quoted the words of Justice Frankfurter:

> Great concepts like . . . "liberty" . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesman who founded this Nation knew too well that only a stagnant society remains unchanged.
>
> 410 U.S. at 169, citing National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, dissent of Frankfurter, J.

That "liberty" within the protection of the due process clauses emcompasses the sorts of associational interests at stake in a decertification transfer appears from the rationale of Morrissey v. Brewer, 408 U.S. 471 (1972). Morrissey held procedural

due process applicable to a parole revocation, but first explored the nature of the interests at stake to determine whether due process applied:

> Subject to the conditions of his parole, [a parolee] can be employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. . . .
>
> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege" by whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. . . .
>
> 408 U.S. at 482, emphasis added

Amici submit that their interpersonal relationships which form a social fabric, and upon which their well being and even their lives may depend, are within the "core values" of the liberty protected by the due process clauses. Amici further submit that because an involuntary transfer threatens these liberty interests, due process must apply wholly apart from "property" and "life" analyses.

III

STATUTORY BEST INTEREST REQUIREMENTS DEMAND A HEARING

Prerequisite to a state's participation in title XIX is submission of a "State plan for medical assistance" which "must" inter alia,

> provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent

> with simplicity of administration and the best interests of the recipients.
>
> 42 U.S.C. § 1396a(a)(19)

Amici submit that this statute requires hearings -- as a matter of due process or regulatory or statutory construction -- for four reasons.

First, the best interest requirement strengthens the evidence of a legitimate entitlement sufficient to constitute a "property" interest. It reflects that the transfer, hearing, and free choice of provider provisions relied upon by the Third Circuit are not mere incidents of scheme primarily designed for some other purpose -- such as the economic well being of the health industry -- but are corollaries of a public assistance program whose primary beneficiaries are the recipients themselves. This distinction provides a complete answer to the suggestion of the

Secretary of HEW (Br. at 29-31) that residents' interest in decertification are akin to those of an employee of a government contractor. A title XIX recipient's interests in whether the only home he or she may know will cease to exist is hardly "vicarious" with respect to the statutory scheme ensuring recipients' best interests. Moreover, the public assistance thrust of the statute forecloses any denial of a "property" interest on the basis of a "privilege" vs. "right" argument. Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970).

Second, the best interest requirement answers any argument that the regulatory incidents invoked by the Third Circuit run only against the provider. The best interest requirement is a statutory criterion which a participating state must meet and with which the Secretary of HEW, in passing

on the statutory adequacy of a state plan, must assure compliance. See, e.g., 42 U.S.C. §§ 1396a, 1396c. As noted previously, this structure is precisely parallel to that of categorical public assistance programs in which this Court has found such criteria actionable directly by recipients. See authorities cited pp. 31-34, supra.

Third, the best interest requirement answers the contention that a decertification (or a horizontal or upward transfer) entails no "reduction in benefits" for purposes of the regulation assuring hearings (45 C.F.R. § 205.10)[1] and no diminution

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1. The regulation's provision that "timely notice" may be dispensed with when the recipient "has been placed" in a nursing home (45 C.F.R. § 205.10(a)(4)(ii)(D)) affects only grant adjustments resulting from the resident's placement in the facility; it does not deprive residents of "timely" notice of a proposal to transfer them out of a facility or otherwise to affect assistance benefits. Feld v. Berger, 424 F. Supp. 1356, 1361-63 (S.D.N.Y. 1976).

of an "entitlement" for purposes of due process. Because subjecting residents to transfer trauma may very well reduce drastically -- and often fatally -- the extent to which services are provided "in a manner consistent with . . . the best interests of the recipients," a decertification determination may well defeat an expectancy just as completely as a termination of assistance altogether. It should not be necessary to add that death by transfer trauma certainly terminates the receipt of public assistance benefits.

Fourth, the statutory requirement is that the state plan "provide such safeguards as may be necessary to assure that . . . care and services will be provided in a manner consistent with . . . the best interests of the recipients." Amici submit that an opportunity to present evidence, to hear and to contest the views of HEW,

the state agency, and the provider -- in short, a hearing of some kind -- prior to a decertification is precisely such a "safeguard." That such a safeguard is "necessary" should follow from the consequences of error and a history which includes transfers which have done more harm through trauma than they accomplished through enhancing the "credibility" of enforcement. That such a safeguard is necessary is poignantly established by the posture of the Secretary of HEW and the Secretary of Public Welfare in this case.

The agencies responsible for ensuring residents' best interests -- and enforcing compliance with such regulations as those prohibiting transfers which are contrary to the welfare of recipients -- are actually taking the position that transfer trauma, which threatens the very lives of recipients, does not entitle recipients to any participatio

in decertification decisions; that residents have nothing to add to such decisions -- even though surveyors are frequently ignorant of the nature of residents' interpersonal relationships and the consequences of disrupting them; that decertification "means only that the patient will be required to move" (HEW Br. 41 n.47); and that permitting these agencies to persist in these views is essential to maintenance of their enforcement credibility with providers. Petitioners take these positions apparently without having made any attempt to assess how many residents are at high risk for purposes of transfer trauma -- i.e., without even knowing how many residents may suffer death or morbidity as a result of a decertification.

Amici respectfully submit that such views were accurately characterized as "rank paternalism" by the trial court in

Klein. 430 F. Supp. at 1011. Amici further suggest that such views compel the conclusion that an opportunity to dispute the basis for a decertification decision, before transfers, is a necessary safeguard required by the statute.

Amici are at least as concerned with the adequacy of enforcement mechanisms as are the petitioners. From the prespective of amici and their advocates, enforcement credibility suffers not because HEW and state agencies are reluctant to destroy the entire world perceived by many nursing home residents to vindicate the agencies' authority in the eyes of a provider. The agencies' enforcement credibility suffers precisely because they have proven insensitive to the world of recipients by remaining largely ignorant of many of its incidents and unresponsive to complaints concerning its infringement. By focusing on conveniently quantifiable indicia of care such

as chart contents, staff-patient ratios, and the like to the exclusion of the interests embodied in the "patients' bill of rights" (42 C.F.R. § 449.12(a)(1)(ii)(B)), agencies have abdicated half of their responsibility for the well being of recipients. In fact, the incidents of dignity and humanity guaranteed by the bill of rights are as important to the physical and psychological well being of recipients as are other patient care requirements. By taking the position that these rights can be ignored at its discretion, HEW does far more to undermine its enforcement credibility than by hesitating to subject residents to a life threatening transfer.

The credibility of such agencies would be greatly enhanced by overcoming the self-imposed dilemma posed by life-threatening patient-care violations and the alternative of life-threatening transfers.

A creative bureaucracy can devise enforcement mechanisms such as fines, administrative orders, and the like; if necessary, it can seek the entire range of judicial remedies through the implied remedy doctrine. See, e.g., Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967). Creative use of these mechanisms and remedies holds far more potential for enhancing enforcement credibility than the position of the agencies now before this Court.

IV

TRANSFER TRAUMA AND BEST INTEREST CONSIDERATIONS REQUIRE A PRIOR EVIDENTIARY HEARING

There is little room for dispute as to what criteria govern the requisites of due process. Generally, what process is due is determined by the nature of the private interest at stake, the risk of error and value of additional procedural safeguards, and the governmental interest.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 17-18 (1978); Parham v. J.L. and J.R., ___ U.S. ___, ___, 47 U.S.L.W. 4740, 4744 (June 20, 1979). Whether the "hearing" is "documentary" or "evidentiary" depends upon the nature of the issues which are determinative at the hearing. Compare Mathews v. Eldridge, supra, 424 U.S. at 344-45, with Califano v. Yamasaki, ___ U.S. ___, ___, 47 U.S.L.W. 4765, 4768-69 (June 20, 1979), and Goldberg v. Kelly, 397 U.S. 254, 269 (1970). Whether the hearing must occur prior to the initial deprivation depends upon the impact and practical finality of that deprivation. Compare Mathews v. Eldridge, supra, 424 U.S. at 340-49 with Memphis Light, supra, 436 U.S. at 19-20.

The petitioners and the Town Court dissent variously resist the requisites of due process in this context by derogating

the interests of recipients, the risks of error, and the benefits of additional safeguards, and by exaggerating the burden imposed by the Third Circuit's decision. HEW suggests that the issues of whether a hearing must occur prior to decertification and what process is due be determined on remand. HEW Br. at 42 n.47.

Amici contend that the resistance to the requisites of due process is based upon critically erroneous factual assumptions concerning all criteria, that an opportunity for a prior hearing is unavoidably required, and that although this Court has ample basis for insisting upon a Goldberg prior evidentiary hearing opportunity, it may not entertain the factual assumptions necessary to a contrary result without a remand. Because of the potential impact of this Court's resolution of these issues upon individual transfer situations, amici will note in passing the variations

of analysis relevant to individual transfers.

A. The Individuals' Interests Are Compelling.

HEW minimizes the residents' interest in a transfer by contending that it is the provider which has "the greatest interest" in avoiding decertification, and that decertification does not affect a right to title XIX benefits but "means only that the patient will be required to move from one place to another." HEW Br. 40-41 & n.47. The Town Court dissent at least is free of HEW's apparent reluctance to utter the words "transfer trauma," but dismisses the concept as "necessarily subordinate to the threat posed to all residents by substandard conditions." 586 F.2d at 296. In short, the contention is that the interest of residents in resisting a move is minimal, mixed, or both. Amici disagree.

Again, transfer trauma poses not just an occasional risk to peculiarly sensitive individuals, but a risk of dramatic rises in mortality and morbidity affecting all elderly and infirm nursing home residents. Moreover, although the risk varies with the cognitive and physical condition of each resident, it is correlated with precisely those conditions which typically afflict nursing home residents, and precisely those conditions which render residents especially vulnerable to other life-threatening circumstances -- such as patient-care violations. In other words, the risk of death or dramatic medical decline from transfer trauma often exceeds that of death or decline from patient-care violations, and the risk is highest with respect to the residents most vulnerable to patient-care violations. It is not a question of ignoring the few for the many -- it is the same people who will be injured

or killed by a move who are most threatened by patient-care violations which typically precipitate a decertification issue. See Part II and Appendix 2.

In the individual transfer context, such as that presented by amicus Jill Harris, a resident resisting transfer -- given the opportunity -- typically disputes the provider's contention that medical considerations favor a transfer, either by contesting the argument that a move is indicated or by attempting to show that a transfer is more inimical to the resident's welfare than the risk of remaining in the facility. Although such a context precludes a "mixed interest" argument like that of the Town Court dissent, the error of the argument is similar in the decertification context. Although some may suffer more than others from whatever violations precipitated the issue of decertification, all have a great interest in curing the violations without

the cost of a move, and the ultimate question is whether unavoidable risks of remaining are so life threatening as to make a transfer acceptable even given its risks. That the dilemma is severe cannot reduce the private interest to insignificance for purposes of due process.

Even aside from transfer trauma, it is not "only" a "move from one place to another" which is at stake to residents. Whether a resident's subjective reality is limited to the sights and sounds of a single room or extends to the full expanse of the social fabric within a facility which replaces the outside world, it is the resident's entire world which is at stake. For residents fortunate enough to preserve regular contact with outside friends and family, these associations are typically threatened by a decertification transfer as well. See pp. 4-9, supra.

Accordingly, the interests of residents are neither minimal nor mixed. All are interested to the extent that lives and medical condition hang in the balance, and the world-shattering impact of decertification is at best a lesser evil which is still of enormous magnitude. All have an interest in avoiding both patient-care violations and a life-threatening transfer. If any residents would just as soon move, or require a move in an emergency situation, nothing prevents their move to another facility without a hearing except the possibility that no such facility exists -- a possibility at odds with the petitioners' assumptions.

B. The Risks of Error and Need for Additional Safeguards Are Demonstrated by Petitioners' Arguments.

Both HEW (HEW Br. at 41 n.47) and the Town Court dissent (586 F.2d at 296-97)

argue that the provider's interest in avoiding decertification and the role of surveying teams minimize both the risk of error and the value of residents' participation. These arguments are based upon a myopic exclusion of best interest and transfer trauma considerations and ignore fundamental distinctions between the interests of residents and those of providers.

Were HEW and state agencies fully responsive to their best interest obligations and cognizant of the risks of transfer trauma, this Court might well engage in the sort of analysis which characterized Mathews v. Eldridge, supra, and Parham v. J.L. and J.R., supra. In those cases, this Court found that the critical and narrow medical issue was directly addressed by fully informed and competent personnel so that the risk of error and value of additional safeguards were minimal. If HEW, state agencies and

surveyors routinely scrutinized not only patient-care violations but alternate means of enforcing provider compliance, and if they regularly and reasonably collected patient medical and associational information and calculated the extent of risk to residents posed by a transfer, perhaps they would be able to address the ultimate issue of whether decertification is consistent with best interest requirements or required to protect residents' welfare.

But HEW is urgently trying to ignore transfer trauma, and has gone to the extreme of contending more is at stake for the provider than for residents -- who may die from a transfer -- in a decertification context. Although surveyors seem well equipped to scrutinize charts for missing records, to note objective conditions of cleanliness and staffing, and to record patient complaints, there is no apparent bureaucratic regimen for collecting

information critical to assessing the risks of transfer.

For example, even if the surveyors have access to information concerning patients' medical and cognitive diagnoses, there is no process built into the decertification procedure for correlating those diagnoses with risk of death or medical decline in a transfer -- as was done for the Residents of Edgefield Manor. Nor is there any assurance that surveyors or anyone else connected with the process will ascertain the critically important social incidents of residents' dependencies -- such as how many residents will lose potentially life-sustaining family visits, or even whether alternate facilities exist and whether resident affinity groupings can be preserved in the transfers necessitated by a decertification.

It cannot be assumed that doctors or other medical personnel involved in a survey

team are familiar with transfer trauma or with the patient conditions which correlate with high risk in a move. The doctor who supported the facility's request for a transfer in Jill Harris' case conceded he was unfamiliar with transfer trauma. Most experts in the field are not medical doctors but behavioral scientists. See authorities cited Appendix 2.

Amici submit that agencies and surveyors operate under routines which effectively preclude the receipt and consideration of evidence critical to at least half of the decisionmaking process, and that the risk of error and potential for improvement from resident involvement is accordingly overwhelming. The issue, again, is not merely whether violations exist, but whether decertification is required by residents' welfare and consistent with their best interests. Apparently, the petitioners have made no

attempt whatever to compare the risks of harm to residents from the patient-care violations at Town Court Nursing facility (HEW Br. 7 n.18) with risks posed by a decertification transfer. The very suggestion that the provider has more at stake than residents establishes that they have not done so.

Residents may have little to add to consideration of issues of fire safety, staff credentials, or nutrition. HEW Br. 41 n.47. But the issues they can address -- such as which persons are a part of their lives, what incidents of their reality are important to them, and how urgently they want to stay -- may be even more critical to their well being.

Equally important, residents, or at least their advocates, may have quite a bit to say about what alternative enforcement devices might be available against the provider short of decertification.

The availability of such devices may well involve questions of law, but, if necessary, implied remedies should ultimately provide a full range of enforcement tools. Compare, e.g., Wyandotte Transportation Co. v. United States, 389 U.S. 191, 202-03 (1967), with Bell v. Hood, 327 U.S. 678, 684 (1946). And the sufficiency of such devices to cure existent violations is, of course, a question of fact.

It is critical to note that here the interest of the provider is quite different than that of the residents. Saving residents' lives by avoiding transfers may require enforcement devices which are financially unattractive to providers. Particularly where the provider has private pay as well as title XIX patients, decertification may pose little or no threat. Indeed, amici have personal and lamentable experience with providers who would just as soon lose "unprofitable" welfare patients.

See, e.g., Appendix 1. At the very least, a provider might well argue for waiver of compliance or minimal improvement when a resident's advocate might demand strict enforcement in lieu of decertification.

Of course, no assumption of provider representation can apply to an individual transfer situation, where resident and provider interests may be directly at odds. Again, however, the individual context illustrates that this Court cannot safely assume that the provider's participation in the decertification process adequately protects the interests of residents.

C. Burden Cannot Justify Foregoing Critical Inquiries.

HEW's suggestion that prior evidentiary hearings will impose a tremendous burden of a separate hearing for each resident and for the provider (HEW Br. at 42 n.47) erroneously assumes that a decertification

hearing cannot be held jointly, and, given the financial resources of title XIX recipients, joint representation is likely to be the rule. More important, the "burden" of HEW and state enforcement agencies is largely self-imposed and therefore of little weight.

First, exploring enforcement devices other than decertification should avoid most decertification disputes altogether, and with them the need for resident participation at decertification hearings.

Second, routinizing the collection and consideration of evidence relevant to assessing the risks of transfer trauma to a facility's population (and the devices for minimizing harm if a move proves necessary) would reduce both the necessity for an "evidentiary" form of hearing and the argument that residents have a right to go beyond the submission of documentation. Compare Goldberg v. Kelly, supra, 397 U.S.

at 266-71, with Mathews v. Eldridge, supra, 424 U.S. at 345-47.

Third, the statutory demand is that HEW accommodate both "simplicity of administration and the best interests of the recipients." 42 U.S.C. § 1396a(a)(19). At least until HEW and state agencies adequately collect and consider the evidence they now routinely ignore, both simplicity and best interests cannot be honored without a full opportunity for residents and their advocates to present that evidence and insist upon its consideration.

The individual transfer hearing may similarly be subject to simplification if HEW and state agencies recognize that the resident is entitled to dispute the provider's assertion (or that of a commonly "captive" doctor -- see Appendix 3) that the resident's welfare requires a transfer. But until the resident is afforded some other form of opportunity to address the

ultimate issue of medical best interests before a neutral decisionmaker (e.g. Mathews v. Eldridge, supra; Parham v. J.L. and J.R., supra), a plenary evidentiary hearing is necessary. Moreover, because credibility and the weight of conflicting medical opinions will be typically critical, an oral hearing is required. Cf. Califano v. Yamasaki, supra.

D. A Prior Hearing and Adequate Notice Are Required.

Amici submit that once it is recognized that residents' lives are at stake in a decertification decision, and that even the survivors of a transfer are likely to experience irreversible medical decline, the right to a prior hearing follows inevitably. Goldberg v. Kelly, supra, 397 U.S. at 260-61; Memphis Light, Gas and Water Division v. Craft, supra, 436 U.S. at 19-20.

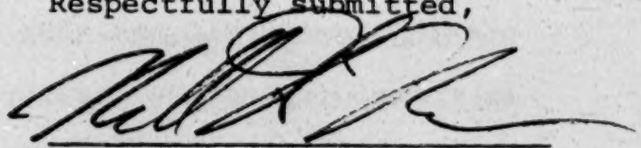
Amici further submit that the correct response to the Town Court dissent's concern for the senility and incompetence of many nursing home residents (586 F.2d at 297) is to require notice "tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra, 397 U.S. at 268-69; Memphis Light, Gas and Water Division v. Craft, supra, 436 U.S. at 14-15 & n.15. In the case of incompetent residents -- who are typically not subject to any adjudication of incompetence -- the agencies should be required to make reasonable efforts to give notice to any friends or relatives known to the facility or to caseworkers. Cf. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).

CONCLUSION

Amici respectfully submit that the

judgment of the court of appeals should be affirmed.

Respectfully submitted,



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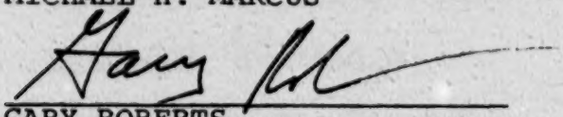

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900 Board of Trade Building
310 S.W. Fourth Avenue
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Attorneys for Amici
Jill Harris and the
Residents of Edgefield Manor

JULY 1979

APPENDIX 1

Rose Haven
748 N. W. HILL PLACE
ROSEBURG, OREGON 97470
PHONE 672-1631

January 12, 1978

Mr. John Robinson, Manager
Adult and Family Services Division
Roseburg Branch
P.o. Box 70
Roseburg, OR 97470

Re: Glen Hufman Helen Martin
Ralph Clark Lillian Beaudry

Dear Mr. Robinson:

Due to the new reimbursement formula the Adult and Family Services Divsion has decided upon for support of welfare patients in Oregon nursing homes; Rose Haven is re-evaluating its welfare patients. Any welfare patient that requires an excessive amount of nursing staff time will be transferred out of the facility after the proper 14 day notification to the Adult and Family Servies Division has been given.

I have reluctantly taken this action because of the severe economic restaints the Division has placed on nursing homes in Oregon. Rose Haven cannot continue to sell its services for less than the cost of providing those services. Thus, we at Rose Haven must be very careful that the welfare patients we have do not require excessive staff time to care for them.

The four patients listed above have been evaluated and it has been determined that they are requiring an excessive amount of staff time and will have to be transferred.

On January 27, 1978 the four nursing beds now occupied by the above patients will be given to four private patients who are currently on our waiting list.

If you have any questions please feel free to call.

Sincerely,

ROSE HAVEN, INC.

Duane G. Miner
Administrator

DGM/dp

cc: Kay Knox

APPENDIX 2

SUMMARY OF RELOCATION LITERATURE

Amici submit that Roe v. Wade, 410 U.S. 113 (1973), provides ample precedent for direct recourse to medical literature concerning mortality risks. Roe in relevant part affirmed a district court judgment declaring a Texas criminal abortion statute unconstitutional. After finding a pregnant woman's right to privacy sufficient to bar state regulation of her right to procure abortion absent a compelling interest, the Court proceeded to find the state's interest in the woman's health sufficient to warrant state regulation of "the abortion procedure in ways that are reasonably related to maternal health" after the first trimester of pregnancy because "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." 410

U.S. at 163-64. The Court drew support for its conclusion concerning the relative mortality risks from literature of the same kind as here invoked by Amici. Id. at 149 & n.44.

Professionals within various fields of social and medical science have generated a substantial body of literature exploring various aspects of "transfer trauma" -- a term denoting stress associated with relocation. Although, as in any field, the literature reveals that much is left to be learned about transfer trauma, several propositions flow from the literature without contradiction:

1. A transfer of a population of institutionalized elderly persons with substantial cognitive and/or physical impairment involves a grave risk of dramatic increases in death rates and illness if the staff does not move with the patients;

2. Although relatively healthy populations of elderly persons have been moved without apparent increase in death rates, all studies which have addressed the question have discovered evidence of increased morbidity occasioned by the transfer;

3. Great reductions in transfer mortality have been accomplished by retaining the same staff, but evidence of increased morbidity in such transfers remains.

Probably the first published study of an inter-institutional transfer of infirm elderly was Aldrich and Mendkoff, Relocation of the Aged and Disabled: A Mortality Study, 11 J. Am. Geriatrics Society 185 (1963). Aldrich and Mendkoff studied the transfer of 182 patients occasioned by the closing of the Chicago Home for Incurables in 1958-61. For each age decade within the population transferred, the authors compared death rates for the year following the transfer with an expected death rate calculated upon ten years' experience at the

institution prior to the relocation. They found the annual mortality rate for all ages had increased from 19 to 32%, and for all ages 70 and older, from 23 to 38%. More significantly, the authors found:

> Analysis of the deaths according to the months elapsed since relocation (Table 3) showed that the number of deaths in the first three months was substantially higher than during the remainder of the year. The actual and expected death rates in the last nine months of the year were approximately the same; in the first three months of the year the actual death rates for patients over 70 was about three and a half times as high as the expected death rates, and for all patients it was more than three times as high as the expected death rate. The significant increase in the death rate, therefore, occurred primarily in the first three months following relocation.
>
> pp. 187-88, footnote omitted

The authors discounted seasonal variation as explanation for the three month peak. P. 187 n.3.

The three month period is now typically regarded as critical for reflecting the impact of relocation. Bourestom and Tars, Alterations in Life Patterns Following Nursing Home Relocation, 14 Gerontologist 506, 508 (1974); Gutman and Herbert, Mortality Rates Among Relocated Extended-Care Patients, 31 J. of Gerontology 352, 356 (1976); Novick, Easing the Stress of Moving Day, 41 Hospitals, J.A.H.A. 64, 74 (1967); Kahn and Kaplan, Phase-Out of Grafton State Hospital, Interim Report 15 (Mass. Dept. Mental Health) (1974). Other investigators have used periods other than three months, but short of a year, to assess transfer trauma. Brody, Kleban and Moss, Measuring the Impact of Change, 14 Gerontologist 299 (1974) [two weeks, four months, eight months]; Jasnau, Individualized Versus Mass Transfer of Non-Psychotic Geriatric Patients from Nursing Homes, With Special Reference

to the Death Rate, 15 J. Am. Geriatrics Society 280, 282-83 (1967) [six months]; Killian, Effect of Geriatric Transfers on Mortality Rates, 15 Social Work 19, 20, 24 (1970) [four months]; Kral, Grad, and Berenson, Stress Reactions Resulting from the Relocation of an Aged Population, 13 Canad. Psychiat. Ass. J. 201, 204 (1968) [four months, six months]; Markus, Blenkner, Bloom, and Downs, Some Factors and Their Association with Post-Relocation Mortality Among Institutionalized Aged Persons, 27 J. of Gerontology 376, 377, 378 (1972) [nine months].

Aldrich and Mendkoff also found that death rates apparently rose in anticipation of the relocation, as well as after the relocation. For all ages, the expected mortality rate based on ten year calculations was 19%, but a rate of 30% was actually experienced during the period of anticipation; for ages 70 and older,

the rate apparently rose from 23% to 34%. The authors could not exclude the possibility that these figures were due to chance (i.e., the differences were not "statistically significant"), and hence concluded only that the figures "suggest[ ] a possible relationship . . ." 11 J. Am. Geriatric Society at 188, 192. Boureston and Tars, supra, in a study discussed below, reached findings they found "consistent with those reported by Aldrich and Mendkoff (1963) and [which] confirm their suggestion that anticipation of relocation has effects which are nearly as lethal as the relocation itself." 14 Gerontologist at 508. Although Killian, supra, did not expressly address the issue, he related the circumstances of two deaths which suggest they were a result of anticipation of relocation. 15 Social Work at 26.

Professor Morton A. Lieberman, Ph.D., of the University of Chicago, seems to have published far more articles on transfer trauma than anyone else in the field: Dr. Lieberman studied four distinct transfers. The relocation which involved a broad enough range of patients to enable Dr. Lieberman to explore the factors which correlate with a high risk of transfer trauma was deemed the "mass transfer." Lieberman, Relocation Research and Social Policy, 14 Gerontologist 494, 495-96, 500 (1974) Referring to the dramatic increase in death rates, Dr. Lieberman observed:

> Survival is clearly related to the physical and cognitive condition of the person; however, it is important to hasten to add that whatever evidence we have suggests that it is not simply that these individuals would have died had relocation not taken place -- for in contrast to a carefully matched control group in another state hospital, three times as many people died among the relocated.
>
> P. 500

Another often cited relocation study is that of Eldon Killian, Effect of Geriatric Transfers on Mortality Rates, supra, 15 Social Work 19 (1970). Killian studied the fate of two groups of residents of Stockton State Hospital who were relocated when a portion of that hospital was closed. The first group was transferred to other state hospitals, the second to nursing homes, convalescent hospitals, boarding homes, and family care homes. Both groups consisted exclusively of persons 60 years of age and older. Both groups were carefully matched with control groups with respect to age, sex, race, organic or functional diagnosis, length of hospitalization, and whether the patient was ambulatory. The groups studied and the control groups were alike in each of these respects, and differed only in that the control groups were not relocated. Killian found that the death rate of

the group transferred to other state hospitals was 4.98 times higher than the death rate of the control group, while the mortality rate for the group transferred to nursing homes and the like was 8.99 times that of the control group. 15 Social Work at 21, 25.

Kahn and Kaplan, in Phase-Out of Grafton State Hospital, supra, studied the impact of a transfer of the entire population of Grafton State Hospital in Massachusetts. Focusing on the fate of patients over 65 years of age, they found that 5% of these patients died within three months of the transfer, a figure equivalent to an annual mortality rate of 20% as compared with a five year average annual mortality rate of 7% among such patients prior to transfer. Drs. Kahn and Kaplan concluded:

> The mortality figures, within three months of transfer, could

> be considered as due to the stress of relocation itself, and this would be most significant to evaluating the success of the relocating procedure.
>
> Interim Report at 15

Although moving relatively healthy patients apparently does not create an imminent risk of increased mortality, every investigator who has examined the question has concluded that such a move does increase sickness among elderly persons. Professor Lieberman has insisted the inquiry must proceed beyond mere mortality rates:

> Foremost on my list of near idiocies has been the over-preoccupation with death rates. All too often investigators have been involved in what may appear to be a bizarre numbers game. If we manage to provide service to the very elderly by relocating them into institutional structures and find we have not statistically increased the probability of death, our subjective experience is a sense of relief, nay, almost a sense of victory and a feeling that

> we have done our job well. . . [T]o construct a rational policy of planning for the care of the elderly solely on the basis of minimizing the risk of mortality is narrow from a humanitarian perspective and also, I believe, scientifically suspect. . . .
>
> A more useful orientation for studying the effects of relocation would be to ask the question whether the individual departs, subsequent to being moved, in major ways from his prior physiological, behavioral, and psychological status. . . .
>
> 14 Gerontologist at 495

Professor Lieberman found dramatic physiological, behavioral, and psychological deterioration among substantial portions of all of the populations he studied. Of 45 "healthy and psychologically robust elderly . . . studied in a forced relocation from a small hotel-like institution to a larger quasi-military institution for the aged," "23 showed marked decline, including four deaths;" of 85 "community-dwelling aged . . . who voluntarily entered homes for the aged," "41 showed marked

decline, including 13 deaths;" of 82 persons constituting "a highly select group of geriatric mental hospital patients who were discharged to a variety of community based institutional and semi-institutional settings," "40 showed marked decline, including two deaths;" of 427 patients "who were relocated en masse from a state mental hospital to a variety of other institutions," "237 showed marked decline, including 78 deaths." 14 Gerontologist at 495-96.

Bourestom and Tars, supra, studied two relocations: a "radical change" group which moved from a county run medical facility to a private nursing home with an attendant change in staff and routine, and a "moderate change" group which moved to a modern building, but retained its staff and programs. 14 Gerontologist at 507. Focusing on morbidity, the authors found:

> Following the move, patients in the radical change group also showed a marked decline in the number of psychosocial activities engaged in such as occupational therapy and recreational therapy, whereas patients in the moderate change group showed little or no change in participation in these activities. Paralleling this decline in psychosocial activity was a corresponding increase in observed low level behavior in the radical-change group as reflected in the observation weighted score.
>
> Id. at 508

The authors were unable to report the figures beyond the first month after relocation because "mortality caused the sample size to decrease beyond the point of meaningful statistical analysis in the later stages of the research." Id. at 507-08.

In another publication, the authors revealed the extent of that mortality: the death rate among the radical change group was six times that of the control in the three months preceding the move, and eight times that of the control during

the three months after the move. Bourestom, Pastalon, and Tars, Relocation Report No. 2, Death and Survival 3-4 (Institute of Gerontology, University of Michigan-Wayne State University) (1972?).

Kahn and Kaplan, supra, reported that the patients transferred from Grafton State Hospital were administered two tests prior to their transfer, and the tests were readministered at various times after the transfer to the survivors. Interim Report at 10, 14. The Activities of Daily Living (ADL) test was used "to gain some estimate of the amount of nursing care each patient required for daily activities, such as: meals, personal hygiene, dress, mobility and medication. Three choices of categories were offered: total nursing care, some nursing care and self-care." Id. at 10. In addition, the Brief Psychiatric Rating Scale (BPRS) "was used to gain some estimate of the presence and severity of

psychiatric symptoms. Only three choices were given for each of the 16 symptoms: not present, some and severe." Id. The authors found that 22% of the transferees became worse following the transfer as measured by the ADL scale, and that 35% declined in functioning as measured by the BPRS scale. Id. at 14.

The one factor which appears to have the greatest influence on the mortality risk involved in the transfer of infirm elderly persons is the fate of patient-staff relationships. Uniformly, transfers which have moved the staff with such a population have resulted in dramatically reduced mortality rates as compared with transfers which result in terminating patient-staff relationships. Novick, supra, reported that the relocation of 125 aged patients from an old to a new building at Maimonides Hospital in Montreal resulted in an apparent decrease in

mortality rates. The author attributed the result to three factors: massive preparation of the patients, careful design of the new building with emphasis on meeting the needs of the patients for privacy (almost all received private rooms), and "the preservation of satisfying relationships" among patients and between patients and staff. 41 Hospitals, J.A.H.A. at 70-74.

In a similar study of a move of 96 residents of Vancouver General Hospital in British Columbia from an old to a new wing, Gutman and Herbert, supra, found no increase in the death rate as compared with average death rates in the five years preceding the transfer. 31 J. of Gerontology at 356. Again, relationships among patients and between patients and staff were preserved in spite of the transfer. Id. at 354, 355, 356-57. As was the case in the transfer reported by Novick, Gutman

and Herbert observed a relocation which involved "marked emphasis on physical environment, improved facilities and programs while staff, patient friendship patterns, and geographic location of unit remained essentially constant." Id. at 356-57.

The most dramatic demonstration of the importance of retaining staff and patient relationships resulted from the study of Bourestom and Tars, supra. As indicated above, these investigators studied two moves from county facilities for the aged. The radical change group moved to a private institution, and had to adjust to "a new staff, a new program, a new physical environment, and a new patient population." 14 Gerontologist at 507. The moderate change group moved to an improved physical environment, but "[s]taff and patient groups remained intact as to the nature and structure

of their program." Id. Both groups were compared with non-relocated control groups in a third institution.

> Perhaps the most dramatic finding was a strikingly higher mortality rate for the relocated groups than for their non-relocated counterparts. This effect, however, was noteably greater for the radical-change group than for the moderate-change group. Of the radical-change group, 43% died in the 6 mo. period preceding and the year following relocation compared with the rate of 21% among their controls, a difference which was statistically significant. By contrast, the moderate-change group experienced a 37% death rate compared with a 26% rate among their controls, a difference which could have occurred by chance. . . .
>
> Id. at 508

To similar effect are the conclusions of two other gerontologists:

> Changes in the social environment may have deleterious consequences in terms of psychological well-being and health. Loss of loved ones and loss of familiar objects or surroundings, resulting in helplessness or despair, are related to medical-psychological

> disorders. . . . In general older persons seem to gain satisfaction and support from association with familiar objects and places and from association with persons living in the same environment. . . .
>
> Brand & Smith, Life Adjustment and Relocation of the Elderly, 29 Journal of Gerontology 336 (1974), citations omitted.

Another powerful indication that preserving relationships is critical to survival in a transfer is the fact that investigators of transfers which did not interrupt relationships have found the usual predictors of success and failure unexpectedly upset.

A major study of predictors of mortality among the institutionalized aged was published by Goldfarb, Fisch, and Gerber, Predictors of Mortality in the Institutionalized Aged, 27 Diseases of the Nervous System 21 (1966). The study was not concerned with predictors

of mortality occasioned by relocation per se, but rather explored indicators of mortality risk generally among the subject population. The authors concluded generally that death rates are higher among state hospital patients than among nursing home residents (id. at 22), and that severe cognitive impairment (brain syndrome), physical incapacity, and incontinence were reliable predictors of mortality. Id. at 29. The authors deemed notable the apparent lack of correlation between age or sex and mortality. Id. at 22-23.

Virtually all of the investigators who have published studies of relocation have commented on apparent predictors of relocation survival. Although studies of transfers terminating patient-staff relationships have come to opposite conclusions about age and sex (compare Killian, supra, 15 Social Work at 25 [age does, sex does not, predict relocation mortality] with

Bourestom, Pastalan, and Tars, Relocation Report No. 2, supra, at p. 6 [sex does, age does not, predict relocation mortality]), all investigators who have addressed the question and who have studied transfers without staff have confirmed correlations between relocation mortality and cognitive impairment, physical disability, and incontinence. Aldrich, Personality Factors and Mortality in the Relocation of the Aged, 4 Gerontologist 92 (1964) [cognitive impairment]; Killian, supra, 15 Social Work at 25 [physical disability]; Lieberman, supra, 14 Gerontologist 500 [physical disability and cognitive impairment].

Investigators studying moves which did not interrupt patient-staff relationships found that one or more of the normal predictors of relocation mortality -- physical disability, cognitive impairment, and incontinence -- simply did not work.

Markus, Blenkner, Bloom, and Downs, supra, found ambulation, continence, and organic brain damage apparently unrelated to the survival rates among populations moved without interrupting patient-staff relationships. 27 J. of Gerontology at 379. Gutman and Herbert, supra, found no correlation between survival and mental status prior to transfer, and surprisingly, found the proportion of deaths "greater among ambulatory than among non-ambulatory patients." 31 J. of Gerontology at 356. Kral, Grad, and Berenson, Stress Reactions Resulting from the Relocation of an Aged Population, supra, studied a portion of the population whose transfer Novick described. Kral found, surprisingly, that although none of the psychotic men or women in his subgroup died within the first six months of relocation, 25% of the normal men studied died within that period. 13 Canad. Psychiat. Ass. J. at 205, 208.

It is at least plausible to suggest that physically and mentally impaired patients depend more heavily upon their relationships with staff than do the less impaired patients, for whom other elements of their environment are more critical. Thus a transfer of severely impaired patients who retain their staff involves a subjectively less disruptive alteration of their environment than does a transfer of less impaired patients who also retain their staff. Put otherwise, staff-patient relationships mean more to the impaired, so a change of everything but such relationships is least critical to such patients. This is consistent with Novick, supra, who concluded that preparation of the "mentally confused patients" among his transfer population consisted largely in relying upon "positive cues," which he listed as follows:

> (1) a positive relationship with members of the staff, both paid and volunteer;
>
> (2) a positive relationship with family members;
>
> (3) activities which follow one another in a specific pattern on a daily basis and which are pleasant.
>
> 41 Hospital, J.A.H.A., at 74

In any event, the literature compels the conclusion that the impact of preserving patient-staff relationships can be a matter of life and death for transferred geriatric patients.

Unfortunately, retaining the staff does not necessarily avoid morbidity, although most evidence suggests that a reduced morbidity incident to transfer can be expected. Thus Kral, supra, found that within six months of the relocation described by Novick, 36 of the 54 patients studied by Kral developed symptoms with or without organic signs apparently resulting

from the stress of relocation.

> Of the 13 subjects who presented [organic signs], 6 had infections referable to the respiratory tract. Four of the subjects presented cardiovascular signs (one of them developed a stroke, another had an intraventricular conduction defect and two myocardial infarcts). Three of the subjects had symptoms referable to the eye, and two of these belonged to the group of six subjects with respiratory infections. Two subjects developed dermatitis. Eleven of the 13 subjects developed their organic signs within four months and of these 6 developed them between 2 to 4 weeks after relocation. Three developed the symptoms within the next month; only 1 developed the symptom within the third month and one within the fourth.
>
> 13 Canad. Psychiat. Ass. J. at 204

See also Brody, Kleban, and Moss, supra, 14 Gerontologist at 302 [intra-institutional reorganization produced evidence of severe short-term stress and of persisting effects among some patients].

There is some support in the literature that preparation can reduce the

mortality impact of relocation upon relatively unimpaired geriatric patients. Aldrich and Mendkoff, supra, were unable to measure the effect of "preparatory casework," but indicated that it was [s]ubjectively . . . apparently helpful . . . in reducing mortality." 11 J. Am. Geriatric Society at 192. It bears emphasis, however, that the three-fold increase in mortality observed by Aldrich and Mendkoff (id. at 188) was observed notwithstanding such preparation. See also Blenkner, Environmental Change and the Aging Individual, 7 Gerontologist 101, 104 (1967) [Aldrich and Mendkoff employed "considerable care . . . by a professional social work staff to prepare the older person for the move and to assist in his adjustment to the new place"]. Aldrich explained the higher mortality rate among transferred psychotic patients, and, impliedly, the

apparent failure of preparation as follows:

> [T]he senile psychotic person, although not sufficiently in contact to understand advance explanations of a move, is nevertheless sufficiently aware of familiar environmental cues to become disturbed when the cues are no longer at hand. According to this hypothesis, the senile psychotic individual cannot prepare for a change, and when the change occurs, he lacks the adaptive capacity to cope with it.
>
> Aldrich, supra, 4 Gerontologist at 93

This observation concerning the limited effect of preparation upon cognitively impaired individuals was further developed by Lieberman:

> Psychological preparations such as helping the elderly make decisions about their needs, permitting them some influence on the outcome of their service requests, working with the family, developing programs of trial visits, and the like are among the many strategies practiced by enlightened social agencies. Such a policy is correct not only in its estimation of the human misery involved

> in this transitional stage, but also with regard to the best available evidence on strategies for coping with threat. Yet despite the good sense of psychological preparation, and its firm footing in empirical research on threat, evidence from our research on relocation suggests that it is not a powerful tool in minimizing relocation risk. The reason is not poor practice, but rather incorrect strategy. Relocation is a risk to the individual not because of the symbolic meaning that such transitions imply, but because it entails radical changes in the life space of an individual that require new learning for adaptive purposes. In other words, the cure has been addressed to the wrong problem.
>
> 14 Gerontologist at 497 (emphasis in original)

These observations are confirmed by the experience of Novick. The Maimonides Hospital transfer was preceded by two distinct forms of "preparation," depending upon the characteristics of two groups of the population. The mentally alert portion of the population was prepared through discussion, consultation with respect to

the design of the new facility, and pre-transfer visits to the new site. 41 Hospital, J.A.H.A. at 69-70. With respect to these patients, the preparation addressed the factors expected to address

> the following negative and positive factors in the relocation situation [which] might have a bearing on mortality rate: (1) fear of the unknown, (2) preservation of satisfying relationships, (3) retention of emotionally meaningful possession, and (4) arrangement of space in the building with due regard for the emotional needs of the patients.

Id. at 69

Novick recognized that the "mentally confused patients . . . were not sufficiently in contact with reality to understand advance explanations of the move," and addressed "preparation" to eliminating negative and retaining positive "cues." Novick saw the relative negative cues to relate to the upsetting influence of disturbed patients on each other. Id. at 74.

> Among the positive cues, the following may be listed: (1) a positive relationship with members of the staff, both paid and volunteer; (2) a positive relationship with family members; (3) activities which follow one another in a specific pattern on a daily basis and which are pleasant. Such a stable pattern gives a great feeling of safety to the confused patient.

Id.

The "preparation" of the confused Maimonides patients, therefore, consisted of removing the negative cues by giving the confused patients private rooms, and of reinforcing the positive cues by retaining staff-patient relationships, especially those involving nurse aides and orderlies responsible for the daily care of patients, together with visits from families and preservation of routine in spite of a move to a physically quite different facility. Id.

The relative success of the move studied by Novick, as well as that reported

by Gutman and Herbert, supra, and the moderate change move reported by Bourestom and Tars, supra, is thus attributable to recognition that retaining staff is potentially life saving for all patients, but is especially critical for the cognitively impaired patients whose susceptibility to "preparation" by more abstract means than preserving familiar cues is very low if existent at all.

The apparent failure of even retention of the staff to prevent morbidity incident to a transfer, however, supports Lieberman's conclusion -- addressed to the total impact of a relocation in terms of morbidity as well as mortality:

> Four studies my colleagues and I have conducted over the past years covering 640 individuals (including 175 controls) -- some on healthy elderly moving into affluent, high-care, sophisticated institutions; others involving sick, highly debilitated human beings moving into circumstances that would

> delight a muckracker -- have yielded roughly comparable findings. Namely, no matter what the condition of the individual, the nature of the environment, or the degree of sophisticated preparation, relocation entails a higher than acceptable risk to the large majority of those being moved.
>
> 14 Gerontologist at 495

* * *

APPENDIX 3

On March 20, 1979, Howard Lavin, an administrator of a nursing home in Scappose, Oregon, and a member of an Oregon Task Force to propose rules for the Oregon Health Division regarding nursing homes and other institutions, testified before the Oregon House Aging and Minority Affairs Committee in opposition to HB 2368, a bill which would have required pretransfer hearings for all nursing home residents in Oregon subjected to an involuntary transfer. Mr. Lavin testified in part as follows:

"On a transfer or the discharge of a patient for medical emergency reasons and then reserving the right for that patient to be readmitted: I admit there are some nursing homes fool with this particular proposed rule or law. It's real easy to get rid of a difficult patient in a nursing home, and I'll show you how. If that

patient is costing me too much money per day for one reason or another, I can coerce the physician to transfer that patient to a hospital, fill the bed, and I've kissed the patient goodbye. This is being done. But the correction should be in a rule not in a statute."

STATE OF OREGON)
County of Multnomah) ss.:

I, Gloria M. Bandy, hereby say that I am a Notary Public in and for the State of Oregon, County of Multnomah, and that I prepared the foregoing partial transcription of the testimony of Howard Lavin from a true copy of Oregon House Aging and Minority Affairs Committee Tape No. 18, Side 2, at 657-914 feet, and that said transcription is a complete and accurate transcription of the portion of the testimony it represents.

Gloria M. Bandy

Notary Public for Oregon
My Commission Expires 3/14/80

MOTION FILED
AUG 13 1979

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare, Pennsylvania,

Petitioner,

-against-

TOWN COURT NURSING CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY, LEGAL SERVICES FOR THE ELDERLY POOR, COALITION OF INSTITUTIONALIZED AGED AND DISABLED, INC., AND FRIENDS AND RELATIVES OF INSTITUTIONALIZED AGED, INC.

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TABLE OF CONTENTS

	PAGE
Motion for Leave to File Brief Amicus Curiae in Support of Respondents, and Statement of Interest of the Amici.....	1-m
Brief Amicus Curiae.....	1
Statement of Case.....	1
Summary of Argument.....	4
Argument	
Point I	
The Writ of Certiorari in this Case Should Be Dismissed as Improvidently Granted or, Alternatively, the Judgment Below Should Be Vacated and the Case Remanded for Reconsideration in Light of Newly-Dislosed Developments.....	7
A. Introduction.....	7
B. Roles of HEW and Petitioner State Agency in the Facility Termination Process.....	12
C. The Instant Case: Claims, Parties and History.....	15
D. Available Non-Constitutional Grounds for Decision in this Case.....	24
1. HEW Rulemaking.....	24
2. State Law Grounds.....	27

PAGE

E. Conclusion..... 30

Point II

Should It Reach the Constitutional Issue on which Certiorari Was Granted, this Court Should Resolve the Issue in Favor of the Respondent Patients. 31

A. The Nature and Content of the Governmental Action..... 32

B. Nature of the Due Process Interests which Flow from the Governmental Action.... 40

1. The Patients' "Life" and "Liberty" Interests..... 40

2. The Patients' "Property" Interests..... 43

C. The Input of Patients into the Facility Termination Decision is Meaningful and Important..... 55

Conclusion..... 63

TABLE OF AUTHORITIES

Cases: Page

Baker v. McCollen, 47 USLW 4834 (June 26, 1979) 43

Belcher v. Stengel, 429 U.S. 118 (1976) 23

Bellati v. Heritage Hill at Newton Residence & Convalescence Home, Inc., Civ. Action No. 78-4855 (N.J. Super. Ct., Middlesex Cnty., filed Sept. 14, 1978) 50

Board of Regents v. Roth, 408 U.S. 564 (1972) 32,44

Bracco v. Lachner, 462 F. Supp. 436 (N.D. Cal. 1978) 57

Brill v. Brill, 282 Pa. 276, 127 A. 840 (1925) 55

Burchette v. Dumpson, 387 F. Supp. 812 (E.D.N.Y. 1974) 56

Carey v. Sugar, 425 U.S. 73 (1976) 29

Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975) 63

Commonwealth v. Great American Indemnity Co., 312 Pa. 183, 167 A. 793 (1933) 55

Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1979) 43

Page

DeGregorio v. Beal, Civil No. 75-2033 (E.D. Pa.) 35

DeGregorio v. Segal, Civil No. 76-264 (E.D. Pa.) ... 35,57

Dodson v. Parham, 427 F.Supp. 97 (1977) 46

Fields v. Berger, Index No. 42206/75 (N.Y.Sup. Ct., N.Y. County, 1975)..... 50,58

Fusari v. Steinberg, 419 U.S. 379 (1976) 26

Goldberg v. Kelly, 397 U.S. 254 (1970) 44,45,46

Goss v. Lopez, 419 U.S. 565 (1975) 63

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 47 USLW 4581 (May 29,1979 42,44

Haines v. Kerner, 404 U.S. 519 (1972) 42

Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976) 63

Jay v. Daniels, 479 F.2d 1236 (4th Cir. 1973) 43

Jones v. State Board of Education, 397 U.S. 31 (1970) 30

Kane v. Perry, 88 Misc. 2d 1019 (S.Ct.,Orange Co., 1975), rev'd 55 A.D. 2d 678 (2d Dept. 1976), rev'd 41 N.Y.2d 1051 (1977) 59

Page

Kimbrough v. United States, 364 U.S. 661 (1961) 23

King v. Smith, 392 U.S. 309 (1968) 55

Klein v. Califano, 586 F.2d 250 (3d Cir. 1978) 10,18,29,38

Klein v. Mathews, 430 F.Supp. 1005 (N.J. 1977) aff'd 586 F.2d 250 (3d Cir. 1978) 57

Kremens v. Bartley, 431 U.S. 119 (1977) 26

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 388 (1923) ... 26

Meachum v. Fano, 427 U.S. 215 (1976) 42,43

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 43

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) 43,44,46

Meyer v. Nebraska, 262 U.S. 390 (1923) 43

Mitchell v. Oregon Frozen Foods Co., 361 U.S. 231 (1960) 23

M.S. v. Werners, 557 F.2d 170 (8th Cir. 1977) ... 22

Page

Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) 24,30

Perry v. Sinderman, 408 U.S. 593 (1972) 44,48,53,54, 55

Peterson v. Berger, 75 Civ. 2667 (S.D.N.Y.) 60

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 29

Resident v. Emmanuel Family Training Center, CCH Medicare & Medicaid Guide ¶29,098 (C.A. No. C78-477, N.D., Ohio, filed April 1978) 50

Richardson v. Wright, 405 U.S. 208 (1972) 25

Screws v. United States, 325 U.S. 91 (1945) 41

Shapiro v. Thompson, 394 U.S. 618 (1969) 43

Texas v. Forest Manor Nursing Home, No. 77-8555-H (District Court, Dallas County, Texas, 160th Judicial District, filed August, 1977) 50

Thorpe v. Housing Authority, 386 U.S. 670 (1967) 26

Toles v. Lula Toles Convalescing Home, 364 S.W.2d 680 (Ark. 1963) 50

Page

Town Court Nursing Center, Inc. v. Beal, 586 F.2d 266 (3d Cir. 1978) 3,13,15,16

Town Court Nursing Center, Inc. v. Beal, 586 F.2d 280 (3d Cir. 1978) 3,32,42

United States v. Guest, 383 U.S. 745 (1966) 41

Van Ness v. Shore Manor, Ltd., No. C.3987-75 (N.J. Super. Ct., Atl. Cnty. 1976) 50

Williams v. United States, 341 U.S. 97 (1951) 41

Yaretsky v. Blum, 76 Civ. 3360, 456 F. Supp. 653 (S.D.N.Y. 1978), aff'd 592 F.2d 65 (1979) 36,37,38,57

Youakim v. Miller, 425 U.S. 231 (1976) 26

Zaro v. Strauss, 167 F.2d 218 (5th Cir. 1948) 22

Statutes, Regulations, and Rules:

Supreme Court Rule 19(1)..... 12

Fed. R. Civ. P. 17(c)..... 21

42 U.S.C. §1396 et seq..... 7,46,51,52

7 CFR §271 et seq..... 52

42 CFR §405.1121(k)(4)..... 34

42 CFR §442.105 47,48,51

	Page
42 CFR §442.111.....	48
42 CFR §447.10.....	45
42 CFR §449.10(d)(3)(ii).....	34
45 CFR §205.10(a).....	29
45 CFR §234.60.....	53
Connecticut Public Act No. 78-227.....	50
Kansas Statutes Annotated 39-926, 39-931, 39-936.....	50
Minnesota Statutes §144A.15.....	50
New Jersey Statutes Annotated 26:2H-36 et seq.....	50
New York Public Health Law §2810.....	50
55 Pennsylvania Code, Chapter 275, §275.1(a)(4)(i)(C) and (D).....	28
62 Purden Statutes §401.....	52
Wisconsin Laws of 1977, Ch 112.....	50

Other Authorities:	Page
Brief of HEW	12,13,14,16, 17,24,26,32, 34,47,50,53, 62
Brief of Petitioner	39,52,53,62
Psychology Today, Vol.13, No. 5 (October, 1979)	38
U.S. Senate Subcommittee on Long Term Care, Nursing Home care in the United States: Failure in Public Policy - Introductory Report, (November, 1974) ..	33

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1318

HELEN B. O'BANNON, Secretary of
Public Welfare, Pennsylvania,

Petitioner,

-against-

TOWN COURT NURSING CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS, AND STATEMENT OF INTEREST OF THE AMICI.

The Legal Aid Society of New York City, Legal Services for the Elderly Poor, Coalition of Institutionalized Aged and Disabled, Inc., and Friends and Relatives of Institutionalized Aged, Inc., respectfully move this Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of respondents, by reason of the amici's substantial interest in and ability to contribute to the outcome of this case and their considerable experience in the subject-matter and in the constitutional and evidentiary issues involved here.

1. Movant The Legal Aid Society is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance without cost to persons in New York City who are without adequate

means to employ other counsel. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of indigent persons who are recipients of benefits under the Medicaid Program and are residents in nursing facilities.

2. Movant Legal Services for the Elderly Poor is funded by the Legal Services Corporation through Community Action for Legal Services, Inc. of New York City to provide assistance on research and litigation to lawyers dealing with the problems of the elderly. It is concerned with the legal rights of indigent elderly in nursing homes receiving Medicaid benefits and has represented such persons in numerous actions concerning matters affected by this action. See, e.g. Point II. c. infra.

3. Movant Coalition of Institutionalized Aged and Disabled, Inc. is composed of 15,000 institutionalized residents of

more than 50 long term care facilities in New York State. The Coalition is engaged in advocacy on behalf of the institutionalized elderly concerning issues which affect their welfare, dignity and quality of life. The rights of the members of the Coalition will be directly affected by the issues addressed in this case.

4. Movant Friends and Relatives of Institutionalized Aged, Inc. (F.R.I.A.) is a consumer organization of families and friends of residents of long term care facilities in New York City. F.R.I.A. has more than 1,000 members who monitor the care provided in New York City's 216 long term care facilities and advocate on their behalf.

5. Attorneys from The Legal Aid Society and Legal Services for the Elderly Poor represent a plaintiff class in federal court composed of all Medicaid-eligible residents of nursing facilities in New York

State challenging the State's procedures for transferring them for ostensible medical reasons. Yaretsky v. Blum, 76 Civ. 3360 (S.D.N.Y.) Movants have derived from the representation in Yaretsky considerable knowledge and experience concerning the constitutional questions presented here, though in a different context, and concerning the "transfer trauma" suffered by patients who are involuntarily displaced from their facilities.

6. Also, movants present a position in this case which is not taken by the parties hereto and to which this Court should give consideration, namely, that in light of certain developments and facts the writ of certiorari in this case should be dismissed as improvidently granted or the judgment below vacated and the case remanded for further proceedings.

7. Movants have an obvious and immediate interest in the issue before this

Court in this case. This motion has been filed because counsel for movants have been unable to obtain consent to the filing of this brief from counsel for the Secretary of Health, Education and Welfare, who is purportedly a party in this case in this Court.

WHEREFORE, movants pray that the attached brief amicus curiae be permitted to be filed with the Court.

Dated: New York, New York
August 10, 1979

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare, Pennsylvania,

Petitioner,

-against-

TOWN COURT NURSING CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY, LEGAL SERVICES FOR THE ELDERLY POOR, COALITION OF INSTITUTIONALIZED AGED AND DISABLED, INC., AND FRIENDS AND RELATIVES OF INSTITUTIONALIZED AGED, INC., IN SUPPORT OF RESPONDENTS.

STATEMENT OF CASE

This suit was instituted in the United States District Court for the Eastern District of Pennsylvania during the pendency of administrative proceedings before the Department of Health, Education and Welfare ("HEW") by the nursing facility Town Court contesting HEW's decision to terminate its participation in the Medicare program, which decision in turn required the Pennsylvania Department of Public Welfare to terminate the facility's participation in the Medicaid program as well. In the complaint in this suit Town Court asserted claims against the Secretary of HEW and the Secretary of the Pennsylvania Department of Public Welfare that due process requires that their agencies afford it an evidentiary hearing prior to the termination of its participation in the Medicare and Medicaid programs. In the same complaint six Medicaid-eligible

patients in the Town Court facility asserted against the Secretary of the Pennsylvania Department of Public Welfare the claim that due process guaranteed them the right to be heard on the issue of the termination of Town Court's participation in the Medicaid Program. The proceedings in the District Court eventuated in a judgment dissolving a preliminary injunction entered earlier against the defendants and prohibiting defendants from withholding payments to Town Court for services actually provided to patients. Town Court and the patients filed separate appeals from the District Court's dissolution of the preliminary injunction and the Secretary of HEW appealed from the portion of the judgment adverse to him. The state defendant did not take an appeal and appeared as an appellee in the Third Circuit Court of Appeals.

The Third Circuit, sitting en banc, issued two separate decisions, one deciding Town Court's constitutional claims and the other determining the patients' constitutional claims. With respect to Town Court's claims, the court held that the facility was not constitutionally entitled to a pretermination evidentiary hearing. 586 F. 2d 266. Regarding the patients' claims, the court ruled that the patients had a due process-protected property interest and the right to some opportunity to be heard in connection with the decision to terminate the facility. 586 F. 2d 280 (3d Cir. 1978).

The petitioner Secretary of the Pennsylvania Department of Public Welfare sought, and this Court has granted, a writ of certiorari in this case to review the correctness of the Third Circuit's decision that the respondent patients have a right under

the Fourteenth Amendment's Due Process Clause to participate in the governmental determination to decertify the provider Town Court. By this amicus curiae brief submitted in support of the respondents, The Legal Aid Society of New York City, Legal Services for the Elderly Poor, Coalition of Institutionalized Aged and Disabled, and Friends and Relatives of Institutionalized Aged, set forth their arguments, first, as to why this Court should now dismiss the writ of certiorari as improvidently granted or vacate the judgment and remand the case for further proceedings, and, second, as to why the Court, if it does decide the question presented, should affirm the judgment of the Third Circuit.

SUMMARY OF ARGUMENT

Amici urge that, in light of facts and circumstances of which this Court was not

made aware when certiorari was granted, this Court should now dismiss the writ of certiorari in this case as improvidently granted. Alternatively, this Court should vacate the judgment below and remand the case with directions that it be reconsidered in light of available non-constitutional grounds for decision represented by imminent HEW rulemaking and applicable Pennsylvania state law.

Should the Court decide the constitutional question on which certiorari was granted, it should decide that due process attaches for nursing home patients when the government determines that Medicaid payments to the facility where they reside and receive care should be terminated. Whereas the patients are helpless and dependent on the facility as their only home, the result of the governmental decision will be to deprive them of necessary care or, at best, to expose them to death and serious injury

resulting from transfer. The loss of life and/or physical harm that the patients will suffer, the eviction from their homes and the rupture of their most basic interpersonal relationships, implicate constitutionally protected interests in "life" and "liberty". In addition, nursing home patients have a legitimate "property" or statutorily derived "liberty" interest in being heard which derives from the fact that they were residing in a certified facility and that they are entitled by statute, regulation and policy to continued residence and assistance absent proof of specific conditions, including determination of the patients' overall best interests.

Further, patients are plainly able to provide meaningful and important input into the question of facility termination.

ARGUMENT

POINT I.

THE WRIT OF CERTIORARI IN THIS CASE SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED OR, ALTERNATIVELY, THE JUDGMENT BELOW SHOULD BE VACATED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF NEWLY-DISCLOSED DEVELOPMENTS.

A. Introduction

This Court has granted certiorari in this case to decide the question of whether nursing facility residents who are eligible for benefits under the federal Medicaid Program, 42 U.S.C. §1396 et seq., have a constitutional due process right to notice and an opportunity for some kind of hearing before the government may decide that the nursing facility is unqualified to participate in that program. Amici respectfully urge that, in light of certain circumstances and developments of which the Court was not made aware when certiorari was granted, this Court should

now dismiss the writ of certiorari in this case as improvidently granted. In the alternative, the judgment below should be vacated and the case remanded to the Third Circuit with directions that the case be reconsidered in light of available non-constitutional grounds for decision, including the application of imminent rule-making of the Secretary of Health, Education and Welfare ("HEW") and relevant Pennsylvania state law which will dispose of the controversy or will eliminate or substantially modify the constitutional question presented here.

The reasons why the writ of certiorari should now be dismissed, or the judgment below vacated and the case remanded, flow from an analysis of the nature of the claims in this case and the posture and positions of the parties at various levels of this litigation. That analysis leads ineluctably to the conclusion that the

instant case presents a wholly inappropriate vehicle for this Court's resolution of the constitutional question on which certiorari was granted.

In summary, the several conclusions produced by the analysis undertaken in this brief are as follows: (1) The petitioner Secretary of the Pennsylvania Department of Public Welfare ("state agency") is a mere stakeholder in this litigation who, under applicable federal law, exercises no independent authority in the governmental determinations to terminate the provider from the Medicaid program once HEW terminates the provider from the Medicare program. While petitioner may have an obligation flowing from Pennsylvania state law to provide notice and opportunity for hearing to patients in connection with the facility termination process, that state law was neither pleaded nor developed in the record in this case. Further,

petitioner lacks standing in this court to argue the question presented on certiorari here concerning the patient notice and hearing rights in the facility termination process. (2) The Secretary of Health, Education and Welfare, under the circumstances here, might have been the appropriate party to provide the patients with notice and opportunity for a hearing. However, although he filed a brief in this court and in the Third Circuit addressed to that claim, the Secretary of HEW was not even sued by the respondent patients in this case, and he declined to seek certiorari review of the Third Circuit's adverse judgment in the companion case, Klein v. Califano, 586 F. 2d 250 (3d Cir. 1978), in which he was the party defendant. Finally, HEW plans, in the near future to institute rulemaking in the precise area which is the subject of this litigation which will likely end the controversy or avoid or substan-

tially modify the constitutional question presented. (3) The claims of the respondent patients in this case were pleaded by the provider Town Court's attorneys, and only subsequently was a lawyer "retained" -- by Town Court's attorneys -- to represent the patients. Further, Town Court's attorneys appear to have been the primary actors in prosecuting this case, up to and including the proceedings in this Court. Thus, there exist serious questions as to whether the respondent patients have the benefit of an independent and aggressive advocate for their interests.

Amici respectfully submit that when this case and the issue presented are put into proper focus, as summarized above and more fully explained below, it becomes apparent that the case assumes an isolated and fragmented significance that was not apparent when the writ of certiorari was granted, and that there no longer exist

"special and important reasons," under Supreme Court Rule 19(1), for retaining certiorari in this case.

B. Roles of HEW and Petitioner State Agency in the Facility Termination Process.

An elaboration of the points summarized above necessarily begins with an examination of the respective roles played, under federal law, by HEW and the petitioner state agency in the decision-making process resulting in the termination of a nursing facility from the Medicare and Medicaid programs.

A provider such as Town Court which participates in both the Medicare and Medicaid programs must be certified as qualified for both programs by HEW. (HEW brief, at p. 4 n.9). When HEW terminates a Medicare provider agreement, on the basis of either state or HEW surveys, the participating state is required by applicable

HEW regulations to automatically terminate the Medicaid provider agreement. (HEW brief, at p. 5; 586 F. 2d at 270). In this case HEW, acting upon the recommendation of the Pennsylvania Department of Health, (not the petitioner Department of Public Welfare) notified Town Court of its determination to terminate the facility's participation in the Medicare program. As required by federal law, the petitioner state agency thereupon notified Town Court that because of HEW's determination Town Court must be terminated from participation in the Medicaid program. (HEW brief, at pp. 8-9; 586 F. 2d at 272). Thus, under federal law the petitioner state agency neither participated in the survey of facility conditions nor exercised independent judgment in the facility termination decision.[1]

fn. 1 next page

The absence of a discretionary role by the petitioner in the circumstances here is reflected as well in the positions adopted by the petitioner and HEW in the Third Circuit in this case. There, petitioner conceded that he "participates neither in the decision-making of the survey agency nor in the decision-making of the federal agency," and accordingly he expressly declined to take a position in that court on the legal or factual issues raised by the appeal. Petitioner stated that his "role is basically that of a stakeholder and his position should not be inferred to be either for or against the position of either the federal agency or the nursing facility." (HEW brief, at p. 20). Petitioner adopted this posture

1. However, as more fully discussed later in this brief, the petitioner may have obligations arising under Pennsylvania state law, neither pleaded nor developed in the record in this case, to play an independent role in the facility termination decision.

because of his appreciation of the fact that "he was required to terminate Town Court's Medicaid agreement upon Secretary Califano's termination of Town Court's Medicare provider status." (586 F. 2d at 279). Equally, it was the position of HEW in the Third Circuit that the only real controversy that could exist concerning the due process rights of the facility and its patients was with the federal agency, and not with petitioner. (586 F. 2d at 279).

C. The Instant Case: Claims, Parties and History.

After receiving notification from the petitioner that its participation in the Medicaid program must be terminated because of HEW's decision to terminate its participation in the Medicare program, Town Court commenced administrative review proceedings before HEW. But before these proceedings were concluded, Town Court filed this suit

in federal court; included in the complaint were claims on behalf of six named Town Court patients. (HEW brief, at p. 9; 586 F. 2d at 272). The patients' claims, however, were asserted only against the petitioner state agency; none were asserted against HEW.[2] See 586 F. 2d at 272 n. 5. Further, it is conceded that the petitioner did not appeal to the Third Circuit from the portion of the District Court judgment adverse to it in this case. (HEW brief, at pp. 17-18). Since HEW, the purported appellant in the Third Circuit, was not sued as a defendant in this case, and since the petitioner state agency did not appeal from the District Court judgment, there

2. The verified complaint contains claims by the provider Town Court against both the petitioner state agency and HEW. However, Town Court did not seek certiorari review of the judgment adverse to it in the Third Circuit (586 F. 2d 266) and is not a party to the instant case before this Court.

exists a serious question as to whether a determination of the appeal in the Third Circuit was proper.

Another consequence of the failure of the petitioner to take an appeal to the Third Circuit is that, in the opinion of amici, the petitioner does not have standing to ask this Court to review the constitutional question presented on certiorari. Further, in taking the position in the Third Circuit of a mere "stakeholder" without an interest in opposing the patients' constitutional claims, petitioner failed to properly reserve its arguments on that constitutional question. Although it draws back from resolving these admittedly "close" questions against petitioner, HEW convincingly sets forth in its brief to this Court (pp. 17-21) the arguments why petitioner is thereby disqualified from asserting in this Court the

constitutional question on which certiorari has been granted. No more need be added to those arguments and to the similar arguments asserted by respondent patients in their brief to conclude that the constitutional question is in fact not properly presented to this Court for review.

In view of the petitioner's incapacity to press review of the Third Circuit judgment, the posture of this case in this Court reduces to an effort by HEW -- which was not a party defendant to the respondent patients' claims, did not seek certiorari review in Klein v. Califano, supra, and now proposes administrative rulemaking to satisfy the patients' due process claims -- to secure from this Court a purely advisory opinion. Under these circumstances the constitutional question on which certiorari was granted is not now suitable for a decision by this Court on the merits.

A careful examination of the record also

raises serious questions concerning the independence and effectiveness of the representation of the respondent patients, and, indeed, concerning their capacity to sue in this case. When the case was initiated, the claims of patients were added to the complaint filed by the nursing home and "representation" was provided by the nursing home's attorneys (7a-13a). Amici have been advised that HEW raised a question about this lack of representation at an off-the-record hearing on the application for a temporary restraining order. The record indicates that to circumvent the problem, the nursing home's attorneys sought out and retained (and agreed to pay) another attorney who filed an appearance on behalf of the patients (192a-193a). The record is bereft of evidence, however, that this attorney provided any meaningful participation in the District Court, and he did not parti-

cipate in the Court of Appeals argument. It has further come to the attention of amici that the papers submitted to this Court on behalf of the respondent patients are substantially, if not entirely, prepared by attorneys for Town Court.

The inference suggested by this is that the patients' "participation" here has been used as a vehicle for the nursing home's interests, notwithstanding that it is obvious that the interests of a nursing home and of nursing home patients do not necessarily coincide. It is entirely possible that a nursing home would wish to retain its Medicaid patients but the patients would wish to relocate to a better facility or to return home. Conversely, Medicaid patients may have more interest in remaining in a facility than the facility does in retaining them (since, for example, the Medicaid rate paid for the bed is less than the facility could

obtain from private-paying patients on its waiting list). Or both the patients and the home may be interested in continued certification of the facility, but the patients' interests may be in having mandated improvements or in having the present operator replaced by a court-appointed receiver.

The nature of the patients' representation and potential conflict of interests raise serious question as to whether the patients' interests were effectively asserted from the beginning of the litigation, whether the interests asserted are indeed those of the patients, and even whether the patients' true interests have ever been assessed.[3]

3. For all that is shown in this record concerning the disabilities and dependency of the respondent patients, there may even be a question concerning the capacity of the patients to sue with their present representation. Under Rule 17(c) of the

(fn. 3 continued on next page)

The lack of independent patient representation could explain why the patients' claims were not properly presented at the outset -- why, for example, HEW was not sued in the patients' portion of the complaint. Another serious consequence of the lack of effective independent representation of the patients in this case is the absence in the record below of any development of the substantial state law grounds, advanced for the first time by patients'

(fn. 3 continued)

Federal Rules of Civil Procedure, infants and incompetent persons may only maintain an action in the federal courts through duly appointed representative, next friend or guardian ad litem. Under Rule 17(c), the court must "appoint a guardian ad litem ...or shall make such other order as it deems proper for the protection of the infant or incompetent person." Representation by counsel is not necessarily adequate protection under Rule 17(c), nor does the attorney automatically become the guardian ad litem. Zaro v. Strauss, 167 F. 2d 218, 220 (5th Cir. 1948); M.S. v. Wermers, 557 F. 2d 170 (8th Cir. 1977). In this case no guardian ad litem was appointed and, while the record reflects the nature of the representation, it does not appear that any inquiry was made or order entered to guarantee protection of the interests of the patients.

counsel in their brief in this Court, for disposing of this case or of substantial evidence of patient transfer trauma, the severe physiological and psychological injury which the patient who is involuntarily displaced from his facility is likely to suffer.[4] These glaring and serious deficiencies in the record in this case go to the heart of whether the constituional question on which certiorari was granted is presented with sufficient clarity and focus to warrant a decision by this Court on the merits. Cf. Belcher v. Stengel, 429 U.S. 118 (1976); Kimbrough v. United States, 364 U.S. 661 (1961); Mitchell v. Oregon Frozen Foods Co., 361 U.S. 231 (1960).

4. The available state law grounds for disposing of this case and the issue of transfer trauma are more fully discussed later in this brief.

D. Available Non-Constitutional Grounds For Decision in this Case.

1. HEW Rulemaking

The rulemaking which HEW, in its brief to this Court, announces it intends to institute "in the near future" for the purpose of "enhancing patient participation in the survey and termination process" (HEW brief, pp. 17, 37) may end the controversy here (if there remains one at all) and will, at the least, modify or eliminate the constitutional question presented here. Since the applicable law bearing on the precise procedural questions upon which certiorari was granted in this case is, by HEW's admission, undergoing "substantial revision", it would be a "particularly inopportune time" for this Court to consider a constitutional challenge to the procedures. Cf. Murel v. Baltimore City Criminal Court, 407 U.S. 355, 358 (1972). It would seem

that the "appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute." Richardson v. Wright, 405 U.S. 208, 209 (1972). "In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise." Richardson, supra, 405 U.S. at 209.

If the revised administrative process provides substantially enhanced procedural safeguards for the patients, or results in an administrative determination satisfactory to the patients, there will be no need to consider the constitutional questions presented by this case. Dismissing the writ of certiorari as improvidently granted, or remanding the case to the Third Circuit for reconsideration in light of the contemplated HEW rulemaking, is

thus consistent with this Court's "usual practice of avoiding decisions on constitutional matters if a case may be resolved on other grounds." Youakim v. Miller, 425 U.S. 231, 236 (1976). Cf. Kremens v. Bartley, 431 U.S. 119, 128 (1977); Fusari v. Steinberg, 419 U.S. 379 (1976); Thorpe v. Housing Authority, 386 U.S. 670 (1967). It should not suffice as a justification for a determination of this case on the merits that HEW might like to receive from this Court an advisory opinion on a constitutional issue which it intends to independently address by imminent administrative rulemaking. (HEW brief, pp. 40-41). As this Court has observed, in the "exercise of judicial restraint from unnecessary decision of constitutional issues," the Court "cannot be bound by the wishes of the parties." Kremens v. Bartley, supra, 431 U.S. at 134 n. 15, 136. See also Layne & Bowler

Corp. v. Western Well Works, 261 U.S. 388, 393 (1923).

2. State Law Grounds

Although the pleadings, briefs, and record in the lower courts fail to present the issue, it is clear that applicable Pennsylvania state law may be the source of patient property interests in the facility termination process which are protected by due process and, indeed, may independently secure for the patients the procedural safeguards which they seek in this case.

In their brief to this Court, patients' counsel set forth for the first time provisions of Pennsylvania state law which give the patients due process protected property interests in the opportunity to be heard in connection with a facility termination decision. There are additional provisions of Pennsylvania law which by their own terms appear to provide hearings for patients in connection with

a facility termination decision which has the inevitable effect of involuntarily displacing the resident patients from that facility in order to continue their Medicaid payments. The regulations of the petitioner Pennsylvania Department of Public Welfare governing hearings for recipients of public assistance guarantees a hearing to a recipient who has experienced a "denial, discontinuance, reduction, or exclusion from a Departmental service program including the failure to take into account the client's choice of a service or a determination that he must participate in a service program" or a change in the "manner or form of payments." 55 Pennsylvania Code, Chapter 275, section 275.1(a)(4)(i)(C) and (D). Under these regulations it would seem that the respondent patients, who must be transferred to another facility in order to remain eligible for Medicaid payments for nursing services

rendered to them, have a state law right to be heard on the question of whether the facility in which they are presently resident should be decertified. These state hearing regulations go much farther in this regard than the federal hearing regulations at 45 CFR §205.10(a), discussed by the Third Circuit. 586 F. 2d at 257, 286. To the extent that the scope and applicability of these regulations are unclear, and the resolution of their meaning by the Pennsylvania state courts might avoid or significantly modify the federal constitutional question presented here, then federal court abstention under Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) might be indicated. Cf. Carey v. Sugar, 425 U.S. 73 (1976). In any event, the existence of these possible adequate non-federal grounds for decision in this case, which were not raised and developed below, seriously undermines the importance

and clarity of the federal question presented here and militates against its decision by this Court.

E. Conclusion

Even if the considerations and developments discussed above do not necessarily render this case moot, or remove the element of case or controversy, or entirely dispose of the patients' claims, they unquestionably cast the claims "in a different light, not contemplated by...[the] original grant of the writ." Murel v. Baltimore City Criminal Court, 407 U.S. 355, 357 n.3 (1972). Amici respectfully suggest that the totality of circumstances disclosed since the writ of certiorari was granted make this case an inappropriate vehicle for decision of the constitutional question presented here. Jones v. State Board of Education, 397 U.S. 31, 32 (1970). Accordingly, the writ of certiorari should

be dismissed as improvidently granted. In the alternative, the judgment below should be vacated and the case remanded to the Third Circuit for reconsideration in light of the imminent HEW rulemaking and relevant Pennsylvania state law.[5]

POINT II.

SHOULD IT REACH THE CONSTITUTIONAL ISSUE ON WHICH CERTIORARI WAS GRANTED, THIS COURT SHOULD RESOLVE THE ISSUE IN FAVOR OF THE RESPONDENT PATIENTS.

As indicated above, amici do not believe that this Court should issue the advisory opinion sought here by HEW concerning the due process rights of patients to notice and an opportunity to be heard before the federal agency in connection with a facility termination decision.

5. As suggested above, the remand might include a direction that Pullman abstention be considered in light of the available, and perhaps unclear, state law grounds for decision here.

However, should the Court address that question, amici contend that it should be resolved in favor of the patients.[6]

A. The Nature and Context of the Governmental Action.

Assessing the due process implications requires examination of the "nature of the interest at stake," Board of Regents v. Roth, 408 U.S. 564, 571 (1972), which in turn requires analysis of the nature of the governmental action and the context in which it occurs. Assuming their similarity to nursing home patients generally, the Town Court patients are among the most helpless, frail and dependent persons in our society. A majority of nursing home patients, on average, are

6. Amici agree with the petitioner (Pet. brief p. 9) and with the Secretary of HEW (HEW brief pp. 22, 41-42) that the issue, in any event, is only the threshold question of whether due process attaches, not what process is due, which was reserved by the Third Circuit for determination upon remand to the District Court. 586 F. 2d 283.

over 80 years old, are mentally impaired, cannot walk, and have four or more chronic or crippling disabilities. U.S. Senate Subcommittee on Long Term Care, Nursing Home Care in the United States: Failure in Public Policy - Introductory Report, (November, 1974) pp. 16-17. In addition, they are largely alone -- almost half "have no viable relationship with a close relative" -- and have resided at the home for two years or more. Id. The four walls of their rooms and corridors, their fellow patients, and the facility staff substantially circumscribe their entire universe and the totality of their human contacts. For better or worse, the nursing home is the only home they have. In part this is because the lack of viable non-institutional options is likely responsible for their being in a nursing home to begin with, and in part it is because a house, and the funds with which to pay for upkeep or rent, is an available resource and

available income under the Medicaid program which must be paid to the facility. See generally, 42 CFR Part 435.

Under Medicaid regulations, the funds for the care that these patients receive in the home where they reside will be terminated no more than 30 days following the "decertification". 42 CFR §449.10(d)(3)(ii); HEW Br. p. 5, n. 13. After that, the patients will be deprived of life-sustaining care [7] or remain without payment. However, the presumption on the part of the Third Circuit and on the parts of petitioner and the Secretary of HEW, that the patients will be transferred and will not suffer interruption of their care, is not warranted. The record contains no such reassurances that their needs will be met elsewhere and the patients are without

7. Non-payment is grounds for discharge from a facility. 42 CFR 405.1121(k)(4).

the means to fend for themselves. Moreover, there is a severe shortage of nursing home beds, especially for Medicaid patients, in the area [8] (See pp. 263a, 266a) and the trial judge found it necessary to direct the government to arrange alternate care (130a).

In addition to deprivation of care and treatment, relocating these patients to other facilities is itself a source of death and serious injury. There is little development in the record below regarding "transfer trauma" (16a, 17a, 253a), although much could have been said. The briefs of the other amici and the respondent patients discuss the large quantity of geriatric literature, reporting such dramatic findings as mortality rate increases of 100% or more, and the

8. This is presently the subject of patient-initiated litigation against the State (DeGregorio v. Beal, Civil No. 75-2033 (E.D. Pa)), asserting failure to make more beds available, and against the nursing home industry -- Town Court included -- (DeGregorio v. Segal, Civil No. 76-264 (E.D. Pa.)) asserting anti-trust conspiracy to boycott Medicaid patients.

repeated findings of trial courts concerning the effects of transfer trauma.

As indicated earlier in the statement of interest of the amici, attorneys from The Legal Aid Society of New York City and Legal Services for the Elderly Poor represent in Yaretsky v. Blum, 76 Civ. 3360 (S.D.N.Y.), a plaintiff class composed of all Medicaid eligible residents of nursing facilities in New York State. Yaretsky presents a comprehensive challenge to the procedural and substantive validity of the process administered in New York State for determining that patients should be transferred from their facilities, ostensibly on the basis of medical decisions that they no longer need their current level of care. The District Court certified the plaintiff class and issued a preliminary injunction which, insofar as appealed from, was affirmed by the Second Circuit Court of

Appeals. 592 F. 2d 65 (1979). See also 456 F. Supp. 653 (1978).[9]

In preparing for trial of the Yaretsky case, respected experts determined that the characteristics of nursing home patients - infirm, frail, confused, dependent - are the very characteristics associated with the highest risks of mortality and morbidity from transfer trauma, and that another major factor is the voluntariness of the transfer. Moreover, research conducted in connection with the Yaretsky case found that for patients slated for transfer because their conditions had improved, who did not want

9. It should be noted that the issue presented in the instant case concerning the due process right of a nursing home patient to notice and hearing in connection with a facility decertification decision is distinct from the due process issue in Yaretsky of the right of a facility patient to adequate notice and an opportunity to rebut the agency determination that the individual patient no longer requires the level of care currently being provided and should be transferred to another facility.

to transfer, even the decision to transfer them had a major effect: more than 20% died or were hospitalized before transfer could be arranged and 25% deteriorated to the point that the decision had to be reversed. Yaretsky v. Blum, supra, Plaintiffs' Exhibit 35; Psychology Today, Vol. 13, No. 5, (October 1979).[10]

It is not that "transfer trauma" reduces the "value" of the patients' benefits. Klein v. Califano, 586 F.2d 250, 259 n.16 (3rd Cir. 1978). It is simply, as a more developed record would have shown, that if the Town Court situation is typical, some patients will die and others will suffer serious injury,

10. The New York State officials who were the defendants in the Yaretsky case did not dispute these findings and, in accordance with them, proposed program modifications which formed the basis for a settlement of the action.

or at best, there is a grave risk that this will occur.[11] This result is a necessary, not an incidental, consequence of decertification.[12]

11. This is not to suggest that a facility may not, therefore, be decertified. Evaluating these competing risks is the point of a hearing.

12. The petitioner states that Pennsylvania "does not intend to minimize (the) seriousness" of these consequences, but relies on its "program" to negate the injury (Pet. Brief, p.22 and n.21). However, there is nothing in the record about what this program entails, whether and how it will be applied, or its efficacy. Moreover, while a particular plan may of course be beneficial in a case where there is no alternative to transfer, no one, including Dr. Leon Pastalan of the University of Michigan Institute of Gerontology and author of the Pennsylvania plan, has suggested that it necessarily reduces the risk to acceptable levels or neutralizes "trauma" as a factor to consider.

B. Nature of the Due Process Interests which Flow from the Governmental Action.

Close analysis of the nature of the governmental action involved makes it possible to identify the bases for a number of interests protected by procedural due process, although it may not always be possible, or necessary, to precisely identify one or another interest as falling into the category of "liberty" rather than of "property" or "life".

1. The Patients' "Life" and "Liberty" Interests.

While the attention of the courts below, of the parties, and of HEW has focused on statutory sources of a property interest, the most serious consequences flowing from the governmental action are that it threatens the very lives of the patients in addition to uprooting and evicting them from their homes. Of all the interests protected by the Constitution,

none can be more important than life itself. Yet, as discussed above, deprivation of life may well be a necessary consequence of the governmental action. If, for example, it were established that as a result of "decertification" the life of a cancer patient would be shortened by three months, that a life sustaining treatment would be interrupted, or that a group of frail patients would succumb to the stress of transfer, could one contend that the life interests of these persons were not entitled to be heard? Short of determinable loss of life, freedom from serious bodily injury is a constitutionally protected interest. Screws v. United States 325 U.S. 91(1945); Williams v. United States 341 U.S.97(1951); United States v. Guest 383 U.S. 745(1966). It protects even persons whose other liberty interests have been legitimately

infringed. Haines v. Kerner, 404 U.S. 519 (1972).

Second, unlike the interests of a recipient in other medical services or even in certification of an acute care hospital, a nursing home is only partially a medical facility; it is the patients' home. As Circuit Judge Adams correctly observed:

> Many of them have been uprooted from the communities in which they spent their working lives. For most of these patients, the limited world of the nursing home is the only community in which they retain a stable network of personal and social relationships.

586 F.2d at 289. Nursing home patients are not like prisoners, whose right to protest arbitrary transfer was curtailed when they were convicted, Meachum v. Fano, 427 U.S. 215 (1976). Cf. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 47 USLW 4581 (May 29, 1979);

Baker v. McCollen, 47 USLW 4834 (June 26, 1979. Rather, they surrendered no liberty rights upon entering the institution and, because they are so helpless, their interests in making their homes and enjoying basic human relationships in relative peace and without arbitrary infringement are perhaps deserving of even greater consideration. Cf. Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("resettle... and start a new life"); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) Meyer v. Nebraska, 262 U.S. 390 (1923); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 10, n.10 (1978); Lopez v. Henry Phipps Plaza South,Inc., 498 F.2d 937 (2d Cir. 1979); Joy v. Daniels,479 F.2d 1236 (4th Cir. 1973).

2. The Patients' "Property" Interests.

The nursing home patients have a legitimate expectation of being heard[13]

13. Either a "property" interest or statutorily derived "liberty" interest. Meachum v. Fano, supra, 427 U.S. at 226.

on the question of whether payments to the nursing home where they live and receive care should be terminated, which derives from the fact that the home where they presently reside is certified by the state and federal authorities (and continuously licensed by the state), and that they are entitled to continued residence and receipt of assistance absent proof of specific conditions, among them that termination is in their best interests. Goldberg v. Kelly, 397 U.S. 254 (1970); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Memphis Light, Gas and Water Division v. Craft, supra; Greeholtz v. Nebraska Penal Inmates, supra.

Reduced to its essential elements, it is apparent that the governmental action - "decertification" - is a decision to cut off Medicaid assistance for the care that these patients are receiving at Town Court

and is a termination of welfare benefits under Goldberg v. Kelly, supra. As with any assistance program, the relationship between petitioner and the respondent patients is based on receipt of benefits, except that, for administrative purposes, the actual payments are made directly to providers of medical care. 42 CFR §447.10. The suggestion that respondents will not lose benefits when payments for their care to the facility are stopped, because they will be transferred to other homes, is disingenuous. This is not only because no transfer may be possible and they may indeed be left without care or payments, but also because if the outcome is continuation of benefits elsewhere, the patients are likely to be forced by helplessness and dependency to accept a substitute facility not of their own choice. This does not change the nature of the action. Petitioner is no more than

a paying agency insofar as the patients are concerned - the patients were not "committed" to the home and are not subject to "transfer" at petitioner's direction - and the action is no more than a termination of benefits.[14]

The patients have been receiving benefits from the certified skilled nursing home of their choice, continued receipt of which is guaranteed by statute, regulations and policies, absent a finding of specific provable facts. 42 U.S.C. §1396a (a)(23); Memphis Light, Gas and Water Division v. Craft supra, 436 U.S. at p.9-12; Goldberg v. Kelly supra. The question is not, as petitioner and HEW would suggest,

14. The argument that this rationale would apply to all constrictions of services under the program goes to the scope of any due process protection, rather than the nature of the interest, which obviously does not always require formal, individualized procedures. See discussion at Point III, infra; Dodson v. Parham, 427 F.Supp. 97 (1977) (individualized notice not required of changes in Medicaid drug list).

simply whether the facility violated or did not violate certain standards, but rather concerns the overall question of continued payments to the nursing home, of which the purported violations make up only one of several factors. Decertification for violation of standards is a matter of circumscribed discretion, (42 CFR §442.105, HEW brief p.5) which is exercised only rarely; witness the resolution of previous findings of violation by Town Court (HEW brief pp. 6-8) and the fact that, as the respondent patients' brief reports, of the more than 10,000 Medicaid nursing homes, only 40-50 facilities are decertified in a normal year.

In addition to such administrative criteria as prior history, seriousness of the offense and prognosis for improvement, consideration of "patient-centered" criteria is not only an entitlement grounded in established policy and practice,

Perry v. Sinderman, supra, 408 U.S. at 603 (1972),but as discussed below, is legally mandated. Among the considerations that, perforce, go into the broader inquiry to determine final disposition, are the alternative sources of care available, the alternative remedies available,[15] and the comparative effect on the patients. No one could suggest that whether the patients overall interests are better served in the facility, with its deficiencies, or elsewhere,is not a, or perhaps the,critical question for the decision maker,[16] else enforcement

15, e.g. submitting a plan of correction (42 CFR §442.105), conditional certification (42 CFR §442.111), receivership (see fn.17 infra).

16. Although amici are not close enough to the situation to express an opinion, amici note that the Trial Court concluded:

(fn. 16 continued on next page)

of standards be little more than a bureacratic exercise for its own sake. Nor could anyone suggest that the outcome will invariably be the same, for example, regardless of whether the patients depend on the facility for unique or specialized services, or whether the facility is the only provider in a remote rural area, or

(fn 16 continued)

> It is absolutely clear to me that...the patients at Town Court Nursing Home are better off there than they would be anywhere else in the foreseeable future. (128a)

and

> ...it is clear on the record that the continuation of patients in the nursing home during that period [of administrative review] would not be inconsistent with the continued health and welfare of the patients - in other words, none of the alleged complaints bear on any serious safety or health hazards...

whether decertification should be delayed for a short period until a nearby replacement facility under construction is ready, or whether an option such as court appointed receivership to replace deficient management is available to resolve the problem without harm to the patients or loss of a sound physical plant.[17]

17. New York Public Health Law §2810; Minnesota Statutes §144A.15; Wisconsin Laws of 1977, Ch 112; New Jersey Statutes Annotated 26:2H-36 et seq; Kansas Statutes Annotated 39-926, 39-931, 39-936; Connecticut Public Act No. 78-227; Resident v. Emmanuel Family Training Center, CCH Medicare & Medicaid Guide ¶29,098 (C.A. No. C78-477,N.D. Ohio, filed April 1978); Texas v. Forest Manor Nursing Home, No. 77-8555-H (District Court, Dallas County, Texas, 160th Judicial District, filed August,1977); Toler v. Lula Toler Convalescing Home, 364 S.W. 2d 680(Ark. 1963); Fields v. Berger, Index No. 42206/75 (N.Y.Sup. Ct.,N.Y. County, 1975); Van Ness v. Shore Manor, Ltd., No. C.3987-75 (N.J. Super. Ct., Atl. Cnty. 1976); Bellati v. Heritage Hill at Newton Residence & Convalescence Home, Inc., Civ. Action No. 78-4855 (N.J. Super. Ct., Middlesex Cnty., filed Sept. 14, 1978).

The entitlement of patient interests to a status of at least equality with the government's administrative interests flows from the very origins of the Medicaid program which mandates:

> such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients.

42 USC §1396a (a)(19). Indeed, the standards for nursing home operation, and enforcement of standards, have little meaning except insofar as they further "the best interests of the recipients."[18]

18. Consideration of best interests is incorporated into the regulatory criteria for determining whether a deficient facility should be decertified under Medicaid, which permit certification if the deficiencies "do not jeopardize the patient's health and safety nor seriously limit the facility's capacity to give adequate care" (42 CFR §442.105(a).

Petitioner and the Secretary of HEW err fundamentally when they speak of the patients' interests being indirect and derivative. (Pet. brief, pp.15, 18; HEW brief, p.31). Exactly the opposite is true. The purpose of the Medicaid program is to make medical assistance available to aged, blind and disabled individuals who are in need of assistance, 42 USC §1396,[19] and whatever interest a provider may have is derived from the recipients' interests.[20] The nursing home here derives its interest in obtaining Medicaid reimbursement from the fact that recipients reside there, not the other way around, in a manner which is comparable to the interests of a supermarket under the Food Stamp Program, 7 CFR §271 et seq., or of

19. Pennsylvania state law contains a similar statement of purpose and protection of recipient interests. 62 Purden Statutes §401.

(See fn. 20 on next page)

a landlord who receives direct payment of rent under Title IV of the Social Security Act (Aid to Families with Dependent Children), 45 CFR §234.60. Yet, while petitioner and the Secretary of HEW point out the limitations on the process due the facility (Pet. brief, pp. 5, 8, 18; HEW brief, pp. 38-39), it is implicitly recognized that the facility does have a protected property interest, whether under statute or regulation, or by contract (i.e. the provider agreement). Perry v. Sinderman, supra 408 U.S. at 601. Given the primacy of the patients' interests it is the height of irony that the business interests of nursing homes are assertedly entitled to greater constitutional protection than

20. It is in this respect that petitioner's and HEW's strained analogy to government contracts (e.g. "decision whether Lockheed's latest fighter is faster or a better buy") (Pet. brief, p. 18; HEW brief, p.24, 30) fails.

the direct, deep and overriding interests of the aged and disabled nursing home patients whom the program is intended to protect.

The patients residing at Town Court have a protectable property interest even if their interest is "only" indirect and derivative. "Property" interests recognized and enforceable under state law of contracts, although not incorporated in an explicit agreement, are nonetheless subject to procedural due process protection. Perry v. Sinderman, supra 408 U.S. at 601-602. Thus the fact that the patients are the intended primary beneficiaries of the Medicaid program in general[21] and the provider agreement in particular, gives them a right to assert whatever interest the facility has under

21. Although the Social Security Act provisions defining the State's duties under the federal-state assistance programs merely establish the conditions that a state must meet if it wants federal reimbursement, these conditions have long been held to be

(fn. 21 continued on next page)

the Pennsylvania law of contracts. Brill v. Brill, 282 Pa. 276, 127 A. 840 (1925); Commonwealth v. Great American Indemnity Co., 312 Pa. 183, 167 A. 793 (1933). This right as a "third party beneficiary" gives the patients a property interest which is constitutionally protected since, in each case, the existence of a property interest "hinges on a question of state law." Perry v. Sinderman, supra, 408 U.S. at 604 (Burger, Ch. J., concurring).

C. The Input of Patients into the Facility Termination Decision is Meaningful and Important.

Petitioner and HEW suggest that patients

(fn. 21 continued)

directly enforceable against states by the intended recipients as beneficiaries of the programs. King v. Smith, 392 U.S. 309 (1968).

are unable to provide meaningful and non-duplicative input into the facility termination decision, and that additional proceedings would undercut enforcement.[22] It is paternalistic and patronizing to suggest that nursing homes and government assistance bureaucracies are better judges of patients' "best interests" than the patients themselves. Nursing home patients are no more precluded from meaningful participation than are nursing home owners by lack of specialized medical or technical knowledge since experts, physicians, attorneys and other spokesmen are available to both. Throughout the country,

22. The assertion that patients' interests are too insubstantial to merit more than post-termination review is hardly worthy of response other than to note that, while the monetary interests of providers may be protected by post-termination proceedings, the injury to patients from transfer trauma is "irreparable in the true sense of the word." Burchette v. Dumpson, 387 F.Supp. 812, 819 (E.D.N.Y.1974).

nursing home patients assert their own interests clearly and effectively through their own organizations, State-sponsored "ombudsman" programs, advocates funded by HEW Administration on Aging, and Legal Services Corporation programs. See, e.g., Bracco v. Lachner, 462 F.Supp 436 (N.D. Cal. 1978) (patients represented by Public Advocates, Inc.); Yaretsky v. Blum, supra (patients represented by legal services programs); Klein v. Mathews 430 F. Supp. 1005 (N.J. 1977), aff'd 586 F.2d 250 (3d Cir. 1978) (patients represented by N.J. Dept. of Public Advocate). See also, brief of amici Jill Harris and Residents of Edgefield Manor (this includes patients in Philadelphia, where Town Court is located); DeGregorio v. Segal, supra (patients represented by Community Legal Services).

While patients can provide useful

input across the whole range of "decertification" issues, there are a variety of issues on which patients have a unique perspective and interests different from those of either the provider or the agency (see discussion pp. 55, supra). Perhaps the uniqueness of patient perspective, the variety of remedies available and the value of patient input are best illustrated by several nursing home "decertification" and transfer situations in which amici have been involved. In Fields v. Berger, No. 42206/75 (N.Y. Sup. Ct., N.Y.Co.), New York State authorities found a nursing facility in violation of population density standards and ordered discharge of 1/3 of the patients. HEW ordered a correction of structural violations, and the nursing home operator sought to minimize his financial loss by dumping patients. Intervention by patients represented by amicus Legal Services for the

Elderly Poor, led to agreement for phased reduction of population, takeover of facility by a non-profit receiver and ultimately by a community organization, and a workable plan for correction of structural violations. In Kane v. Perry, 88 Misc. 2d 1019 (S.Ct.,Orange Co.,1975), rev'd 55 A.D. 2d 678 (2d Dept. 1976), rev'd 41 N.Y.2d 1051 (1977), HEW ordered decertification of a small rural nursing home for structual deficiencies. The owner was relatively indifferent because Medicaid patients made up only a small portion of the total population. Patients asserted that deficiencies were counterbalanced by acknowledged exemplary care, the non-emergency nature of violations, anticipated approval of replacement facility, and evidence of transfer trauma. Although no new Medicaid patients were admitted, a hearing was ordered to weigh the competing risks for the current Medicaid

patients who were permitted to remain for several years until the matter was mooted when the owner retired and went out of business. In the case of Kings Harbor Nursing Home, both New York State authorities and HEW attempted to decertify and de-license the facility for inadequate care. The patients, represented by the Kings Harbor Organization of Relatives and amicus F.R.I.A., did not oppose these actions but, to avoid relocation, assisted the state in obtaining removal of the present management, imposition of the state as a temporary court-appointed receiver, and anticipated establishment of a new qualified operator. In Peterson v. Berger, 75 Civ. 2667 (S.D.N.Y.), New York and HEW ordered the decertification and closing of an unsafe nursing home. The owner sought to prevent the closing until just

before Christmas, at which time he began to precipitously discharge patients in order to close the facility quickly and minimize his financial losses. The patients, represented by amicus Legal Services for the Elderly Poor, did not oppose closing but obtained, through court intervention, an agreed plan to insure appropriate placement of patients and safe and orderly discharge.

The above examples illustrate that the nursing facility and the government agenct have interests of their own which do not necessarily parallel the legitimate interests of patients, and that neither the facility nor the agency is an adequate substitute for responsible presentation by patients of their own interests. They also illustrate that accommodating presentation of patient interests does not undercut the ability of the government to enforce standards

in nursing homes. The patients and amici have every interest in spirited and resolute enforcement of nursing home standards. However, it is no solution to punish patients for the sins of the facilities; the solution is more thoughtful enforcement and creative remedies.

Finally, the argument that a hearing for patients would cause intolerable delay (HEW brief, pp.38-39) and undermine the ability "to quickly and effectively terminate" providers (Pet. brief p. 23) are specious indeed in this case. The time needed to provide a hearing is minimal in relation to the leisurely pace with which HEW and Pennsylvania moved against Town Court (HEW brief, at pp. 6-10), and the requirements of due process are sufficiently flexible to cope with the need for prompt action when it is legitimately

required. Goss v. Lopez, 419 U.S. 565, (1975); compare Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976) with Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975).

CONCLUSION

For the reasons set forth above, amici respectfully urge that this Court dismiss the writ of certiorari in this case as improvidently granted or vacate the judgment below and remand the case for further proceedings; in the alternative, this Court should affirm the judgment of the Court of Appeals.

Dated: New York, New York
August 10, 1979

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Supreme Court, U. S.
FILED
AUG 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1318

HELEN B. O'BANNON,
SECRETARY OF PUBLIC WELFARE, PENNSYLVANIA,
Petitioner,

v.

TOWN COURT NURSING CENTER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL CITIZENS' COALITION FOR NURSING HOME REFORM

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* NATIONAL CITIZENS' COALITION FOR NURSING HOME REFORM 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. NURSING HOME RESIDENTS ARE ENTITLED TO THE PROTECTIONS OF THE DUE PROCESS CLAUSE WHEN THE FACILITY IN WHICH THEY RESIDE IS THREATENED WITH DECERTIFICATION AS A MEDICAID PROVIDER 5

A. Nursing Home Residents Have a Life Interest in Continued Occupancy in the Nursing Home Where They Reside 5

1. Nursing home residents are often physically, socially and economically dependent on the facilities where they reside 5

2. Transfer trauma is a life-threatening phenomenon which records greatly increased mortality and morbidity rates for involuntarily-transferred elderly nursing home residents 9

B. Nursing Home Residents Have Liberty Interests in Continued Occupancy in the Nursing Home Where They Reside 12

C. Nursing Home Residents Have a Property Interest in Continued Occupancy in the Nursing Home Where They Reside 16

1. Statutory entitlements to government benefits are property interests protected by procedural due process 19

a. The government benefit at issue in the nursing home context is continued residence at the particular nursing home where the resident lives 21

Page

2. Nursing home residents' contractual rights to continued occupancy in their nursing homes are property interests protected by procedural due process 24

3. Nursing home residents' reasonable and mutual expectations of continued occupancy in their nursing homes are property interests protected by procedural due process 24

II. THE INVOLUNTARY TRANSFER INEVITABLY RESULTING FROM DECERTIFICATION OF A NURSING HOME CONSTITUTES A REDUCTION IN MEDICAID BENEFITS WHICH ENTITLES RESIDENTS TO NOTICE AND HEARING RIGHTS PROVIDED UNDER FEDERAL REGULATION 26

III. NURSING HOMES CANNOT REASONABLY BE EXPECTED TO RAISE ALL ISSUES OF CONCERN TO RESIDENTS IN A DECERTIFICATION PROCEEDING 28

A. Nursing Homes May Choose Not To Oppose Their Decertification from the Medicaid Program 29

B. The Interests of Nursing Home Residents and Nursing Home Facilities Are Not Necessarily Synonymous 30

C. Residents' Legitimate Concerns in the Decertification Proceeding Are Their Own Interests and Not the Vicarious Assertion of Nursing Homes' Interests 34

IV. ONLY A PRE-DECERTIFICATION EVIDENTIARY HEARING CAN ADEQUATELY PROTECT THE DUE PROCESS INTERESTS OF NURSING HOME RESIDENTS 35

A. Nursing Home Residents' Interests in Continued Occupancy Are Fundamental Human Rights 35

B. Nursing Home Residents Can Contribute Substantially to the Questions at Issue in a Decertification Proceeding and Thereby Increase the Correctness and Reliability of the Administrative Decision 37

Page

C. The Public Interest Is Furthered by Giving Nursing Home Residents a Pre-decertification Evidentiary Hearing 40

CONCLUSION 42

TABLE OF AUTHORITIES

Cases:

American Medical Association v. Weinberger, 395 F.Supp. 515 (N.D. Ill. 1975), *aff'd*, 522 F.2d 921 (7th Cir. 1975) 20

Arnett v. Kennedy, 416 U.S. 134 (1974) 18

Berry v. First Healthcare Corp., CCH Medicare-Medicaid Guide ¶ 28,693 (D.N.H., Oct. 26, 1977) 15, 34

Bishop v. Wood, 426 U.S. 341 (1976) 18

Board of Regents v. Roth, 408 U.S. 564 (1972) 14, 17, 18, 19, 24

Bracco v. Lackner, 462 F.Supp. 436 (N.D. Ca. 1978) 11, 27, 28, 34, 37, 39

Briarcliff Haven, Inc. v. Dept. of Human Resources of the State of Georgia, 403 F.Supp. 1355 (N.D. Ga. 1975) 29

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964) 14

Burchette v. Dumpson, 387 F.Supp. 812 (E.D. N.Y. 1974) 12

Caton Ridge Nursing Home, Inc. v. Califano, 447 F.Supp. 1222 (D. Md. 1978), *aff'd*, No. 78-1290 (6th Cir., February 26, 1979) 21

Coe v. Hooker, 406 F.Supp. 1072 (D.N.H. 1976) 20

Doe v. Bolton, 410 U.S. 179 (1973) 14

Eisenstadt v. Baird, 405 U.S. 438 (1972) 14

Feld v. Berger, 424 F.Supp. 1356 (S.D. N.Y. 1976) 22

Friedman v. Berger, 547 F.2d 724 (2d Cir. 1976) 16

Fuzie v. Manor Care, Inc., 461 F.Supp. 689 (N.D. Ohio 1977) 15, 34

Goldberg v. Kelly, 397 U.S. 254 (1970) 19, 35, 36, 41

Cases, continued: Page

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, ___ U.S. ___, 99 S.Ct. 2100 (1979) ... 17

Griswold v. Connecticut, 381 U.S. 479 (1965) 14

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Statutes: Page

Federal:

29 U.S.C. § 483 32

38 U.S.C. § 610 20

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42 U.S.C. §§ 1396 *et seq.* 34

42 U.S.C. § 1396a(a)(10)(A) 15

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42 U.S.C. § 1396a(a)(13)(E) 22

42 U.S.C. § 1396a(a)(19) 19

42 U.S.C. § 1396a(a)(23) 16

State:

Alaska Stat. §§ 8.70.160 and 8.70.170 31

California (Health and Safety Code § 1417-1431) (West) 31

Conn. Gen. Stat. Ann. § 19-607-613 31

Conn. Gen. Stat. Ann. § 19-620 31

Conn. Gen. Stat. Ann. § 19-621a (1979) (West) 31

Fla. Stat. § 400.12 31

Iowa Code 135C.36-135C.48 31

Kan. Stat. § 39-923 (Supp. 1977) 31

Kan. Sess. Laws, Ch. 162 31

Ky. Rev. Stat. § 338.991 31

Maryland, COMAR 10.07.02.08A 14

Mich. Comp. Laws § 217998 31

Michigan Public Law 493 (Dec. 6, 1978) 31

Mich. Stat. Ann. § 16614(13) (Supp. 1979) (West) 31

Mich. Stat. Ann. § 21766 14

Statutes, continued: Page

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Minn. Stat. Ann. § 144A.15 (Supp. 1979) (West) 31
Missouri Senate Bills No. 328, 432, 35, and 419 (passed May, 1979) 32
N.J. Rev. Stat. §§ 26:2H-13-26:2H-16 31
N.J. Rev. Stat. §§ 26:2H-37 *et seq.* (Supp. 1978) 32
N.Y. Public Health Law, Art. 28-A, 2862 32
N.D. Cent. Code § 23-16-06 31
Or. Rev. Stat. §§ 441.705-441.745 31
Washington Senate Bills No. 2337, 2338 31
W.Va. Code §§ 16-5C-5 31
W.Va. Code §§ 16-5C-10 31
Wis. Stat. § 50.04(4), (5) 31
Wis. Stat. Ann. § 50.05 (West) 32

Regulations:

Federal:

42 C.F.R. § 431.51 16
42 C.F.R. § 435.4 15
42 C.F.R. § 435.211 15
42 C.F.R. § 435.700 . . . . . 15, 16, 23
42 C.F.R. § 435.722 15
42 C.F.R. § 435.725 . . . . . 16, 23
42 C.F.R. § 435.734 15
42 C.F.R. § 435.740 16
42 C.F.R. § 435.813 . . . . . 16, 23
42 C.F.R. § 435.815 . . . . . 16, 23
42 C.F.R. § 442.10 15
42 C.F.R. § 442.12(d) 19, 20
42 C.F.R. § 442.30 15
42 C.F.R. § 442.101(d)(1) 31
42 C.F.R. § 442.101(d)(2) 31

Regulations, continued: Page

42 C.F.R. § 442.105 38
42 C.F.R. § 442.105(a) 38
42 C.F.R. § 442.105(b) 31
42 C.F.R. § 442.202(c) 31
42 C.F.R. § 442.251(b) 25
42 C.F.R. § 442.253(a) 31
42 C.F.R. § 442.311(c)(1) 17
42 C.F.R. § 442.311(c)(3) 17
42 C.F.R. § 447.272 22
42 C.F.R. § 447.311 22
42 C.F.R. § 447.315(a) 29
45 C.F.R. § 205.10(a)(5) 27, 28
45 C.F.R. § 249.12(a)(1)(ii)(B)(4) 17
45 C.F.R. § 249.20 16
43 F.R. 4861 (Feb. 6, 1978) 22

Rule:

Rule 24(a), Fed.R.Civ.P. 32

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1318

HELEN B. O'BANNON,
SECRETARY OF PUBLIC WELFARE, PENNSYLVANIA,
Petitioner,

v.

TOWN COURT NURSING CENTER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL CITIZENS' COALITION FOR NURSING HOME REFORM

INTEREST OF *AMICUS* NATIONAL CITIZENS' COALITION FOR NURSING HOME REFORM

The National Citizens' Coalition for Nursing Home Reform is a national organization comprised of fifty-eight local community advocacy groups and many individuals who are actively involved in issues of nursing home reform and advocacy throughout the United States. Of

particular interest to the Coalition are questions concerning empowerment of nursing home residents, quality of life and care in nursing homes, and enforcement of federal and state nursing home regulations.

This case—the first Supreme Court consideration of nursing home residents' rights in any context—is of particular importance to Coalition members.

The Coalition appears as *amicus* in this case with the consent of all parties and respectfully urges this Court to affirm the decision of the Third Circuit below.

SUMMARY OF ARGUMENT

The Due Process Clause states that no person may be deprived of "life, liberty or property, without due process of law."

The Third Circuit ruled below *en banc*, *Town Court Nursing Center, Inc. v. Beal*, 586 F.2d 280 (3rd Cir. 1978), that nursing home residents are entitled to procedural due process when the facility in which they live is threatened with decertification from the Medical Assistance Program. The Court stated, in a companion case, *Klein v. Califano*, 586 F.2d 250, 258 (3rd Cir. 1978) (*en banc*):

> The essence of due process is that legally generated expectations of continued receipt of Government benefits may not be summarily denied by arbitrary administrative action. Notice and an opportunity to be heard enable the recipient of Government benefits to retain their benefits by proving to the administrative agency that specified reasons or causes for termination of benefits have not occurred.

The Third Circuit based its finding of due process rights on nursing home residents' property interest in continued

occupancy in their long-term care facility. Two provisions of the Medical Assistance statute and regulations were found to create the protected property claim. This ruling was a proper analysis of this Court's decisions and should be affirmed.

Several additional claims not addressed by the courts below give further support to the Third Circuit's conclusion that residents are entitled to procedural due process in the decertification proceeding.

In addition to statutory property interests in continued occupancy, nursing home residents enjoy property interests based on contract and on mutually explicit expectations.

Relocation to other facilities, made necessary by the decertification of a facility, creates great stress in elderly nursing home residents who select one facility as home and expect to remain there for the rest of their lives. The increased mortality and morbidity that result—identified as the phenomenon of transfer trauma—directly implicate the life interests of nursing home residents.

Liberty interests, as well, are affected by a decertification decision. A nursing home often becomes the entire world known by its residents. The relationships with other residents and staff and the familiar patterns of life that a known institution provides are permanently disrupted when decertification occurs. Liberty interests in contract, association, privacy, and health are irrevocably affected.

These interests also constitute the statutory benefit of nursing home care. Since these interests are diminished by involuntary transfer, decertification is a reduction in Medicaid benefits within the meaning of the Medical

Assistance law. Residents are thus entitled to the rights of prior notice and hearing provided by federal regulation.

These substantial interests of residents in continued occupancy in their homes cannot be adequately represented by the nursing home provider. Resident and provider interests in decertification will often diverge, particularly over issues of evidence and remedy.

Residents' interests can be protected only through a pre-decertification evidentiary hearing. No post-decertification administrative remedy is available for residents under the Medicaid law, nor could such a remedy, even if offered, be effective. Residents cannot be made whole for these deprivations as they can when the government benefit at stake is cash assistance. Once the status quo is disrupted, it cannot be recreated. In addition, residents can contribute substantially to the correctness of the administrative decision whether decertification is appropriate. This administrative decision is discretionary and based on a balancing of factors related to adequate resident care. Finally, the public interest is furthered by giving residents pre-decertification evidentiary hearings.

ARGUMENT

I.

NURSING HOME RESIDENTS ARE ENTITLED TO THE PROTECTIONS OF THE DUE PROCESS CLAUSE WHEN THE FACILITY IN WHICH THEY RESIDE IS THREATENED WITH DECERTIFICATION AS A MEDICAID PROVIDER.

A.

Nursing Home Residents Have a Life Interest in Continued Occupancy in the Nursing Home Where They Reside.

The interest in life is the first of three interests protected by the due process clause. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

Decertification of nursing homes from participation in the Medicaid program may directly threaten the lives of nursing home residents.

1. *Nursing home residents are often physically, socially and economically dependent on the facilities where they reside.*

A nursing home is an institution where people in need of frequent nursing attention live for long periods of time. Most of the residents of nursing homes are elderly; the mean age of residents is 81.[1] The average length of stay is more than two years.[2]

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[1] National Center for Health Statistics: Charges for Care and Sources of Payment for Residents in Nursing Homes, United States, 1973-74 National Nursing Home Survey. *Vital and Health Statistics.* Series 13-No. 32. DHEW Pub. No. (PHS) 78-1883. Public Health Service. Washington, D.C., U.S. Government Printing Office, Nov., 1977, p. 2 [hereinafter CHARGES FOR CARE].

[2] SUBCOMMITTEE ON LONG-TERM CARE OF THE SENATE SPECIAL COMMITTEE ON AGING, NURSING HOME CARE IN THE

[footnote continued]

Many residents need direct assistance from facility staff in the activities of daily living: more than half need help in walking and bathing; nearly half need help in dressing; and more than one in ten needs help in eating.[3] Nursing home residents, on the average, have four or more chronic diseases[4] and take four to seven different drugs per day.[5]

While nursing home residents are physically dependent on facilities for assistance in life activities, they are also often isolated from contact with the community beyond the facility. More than half the nursing home residents have no close family ties or visits with friends, having outlived the friends and family they enjoyed when younger.[6] As a result, the only human and social contact many residents experience takes place solely within the facility with staff and other residents.

In addition to being physically and psychologically vulnerable, many nursing home residents are economically dependent as well. Nationally, more than half the country's 1.2 million nursing home residents use Medical Assistance as their primary source of payment for their care.[7] Many of these people did not begin their institutionalization as poor people. However, the cost of nursing home care is so high[8] that many residents exhaust their personal financial resources, become impoverished, and only then, turn to Medicaid for support.[9] Indeed,

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UNITED STATES: FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, S. Rep. No. 93-1420, 93d Cong., 2d Sess. (1974), p. — [hereinafter FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT].

[3] FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, p. 17.

[4] FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, p. 17.

[5] FAILURE IN PUBLIC POLICY, Supporting Paper No. 2, "Drugs in Nursing Homes: Misuse, High Costs and Kickbacks" (Jan. 1975), p. x.

[6] FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, p. 16.

[7] In 1973-74, 48% of all nursing home residents relied on Medical Assistance. CHARGES FOR CARE, p. 11. This figure contrasts sharply with the 13% who used Medicaid as the primary source of payment in 1969. CHARGES FOR CARE, p. 23. Between 1964 and 1973-74, primary sources of payment for nursing home care were reversed. In 1964, 53% of all residents used private resources for primary payment and 47% of all residents relied on public sources of various types. By 1973-74, only 37% of all residents relied primarily on their own resources, while 60% of residents relied on public sources. CHARGES FOR CARE, pp. 22-23. The reversal is undoubtedly due, at least in part, to the tremendous increase in the cost of nursing home care. Between 1964 and 1973-74, the average monthly charge for nursing home care increased 159% from $183 to $459. CHARGES FOR CARE, p. 18. In constant dollars, discounting the effects of inflation, the average monthly resident charge increased 60% between those years. CHARGES FOR CARE, p. 20.

[8] By 1977, the average monthly cost for long-term care was $800. Moss, TOO OLD, TOO SICK, TOO BAD, 1977, p. 9. In 1975, the monthly charge for a bed in a skilled nursing facility often exceeded $1000. Brown, *An Appraisal of the Nursing Home Enforcement Process*, 17 ARIZ.L.REV. 304, 306 (1975).

At the present time, charges for nursing home care are substantially greater. In New Jersey, for example, in litigation challenging a state regulation requiring facilities to provide care for Medical Assistance recipients as a condition of state licensure, nursing homes reported that their daily private rates varied between $49 and $63. These figures represent annual charges between $17,885 and $22,995. *New Jersey Association of Health Care Facilities v. Finley*, C.A. Nos. A-1950-77 through A-1954-77 and A-2207-77 (consolidated).

[9] Medicare, the health insurance program for elderly and disabled people, 42 U.S.C. §§ 1395 *et. seq.*, pays for very little nursing home care in the United States. As a program focused on acute care and catastrophic illness, Medicare has stringent limitations on coverage for long-term care: persons must need skilled nursing services and must enter a nursing home within fourteen days of hospitalization at least three days in length, due to the same "spell of illness." 42 U.S.C. §§ 1395d(a)(2), 1395f(a)(2)(C), 1395f(h).

[footnote continued]

nearly half the current Medicaid recipients entered their facilities as private pay residents and converted to Medical Assistance only after an impoverishing period of private-pay status.[10] There are at present between one-quarter and one-half million nursing home residents who were forced into poverty by paying for their necessary nursing home care.[11]

The physical, psychological and financial dependency that characterizes many members of the nursing home population makes the nursing home institution much more than simply the provider of certain nursing and medical services. Nursing homes become, in many instances, the entire and only worlds known by their

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The result of these statutory restrictions is that Medicare pays only 1% of the nation's nursing home bills. CHARGES FOR CARE, p. 12. Indeed, Medicare's share of nursing home costs is reduced from the 4% it paid in 1969. CHARGES FOR CARE, p. 23.

Elderly persons needing nursing home care must generally pay for the care themselves until they exhaust their personal resources and convert to Medical Assistance.

[10] Congressional Budget Office, LONG-TERM CARE FOR THE ELDERLY AND DISABLED (Budget Issue Paper) (Feb., 1977), p. 24 (". . . 47.5 percent of nursing home patients whose care are paid for by medicaid in 1974 were not initially poor by state definitions but depleted their resources and qualified as medically needy.").

[11] If there were a million persons in nursing homes, half were supported by Medicaid, and half of the Medicaid recipients entered their facilities as private-pay residents, the number of people impoverished by paying for their nursing home care would be 250,000. The number is undoubtedly larger, however, because of the greater number of people institutionalized in nursing homes and the substantial increases in nursing home charges over the past several years. If there are 1.2 million people in nursing homes and 65% are supported by Medicaid and 60% entered facilities as private-pay residents, the number forced into poverty by nursing home costs would be 468,000. The number, of course, may be far higher.

residents.[12] It is not surprising, then, that any disruption in the fragile environment can have a devastating impact on nursing home residents.

2. *Transfer trauma is a life threatening phenomenon which records greatly increased mortality and morbidity rates for involuntarily-transferred elderly nursing home residents.*

Studies of elderly nursing home residents involuntarily moved from one facility to another document greatly increased mortality and morbidity rates. The phenomenon at work is called "transfer trauma."

When elderly nursing home residents are forced to move from one nursing home to another, the result is often death. Lieberman, "Relocation Research and Social Policy," 14 THE GERONTOLOGIST 494, 495 (1974); Bourestom and Tars, "Alterations in Life Patterns Following Nursing Home Relocation," 14 THE GERONTOLOGIST 506, 508 (1974); Aldrich and Mendkoff, "Relocation of the Aged and Disabled: A Mortality Study," 11 JOURNAL OF AMERICAN GERIATRIC SOCIETY 185 (1963). Increased mortality rates of as much as 500% to 900% have been documented. Killian, "Effect of Geriatric Transfers on Mortality Rates," 15 SOCIAL WORK 19 (1970). The fatal consequences of involuntary transfer appear quickly, often within three to four months of relocation. Aldrich and Mendkoff, "Relocation of the Aged and Disabled: A Mortality Study," *supra*.

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[12] Nursing homes have been compared to migrant labor camps because of the substantial control they exercise over those under their care. Comment, *Nursing Home Access: Making the Patients Bill of Rights Work*, 54 J.URB.LAW 473, 497 (Winter, 1977). No similar analogy has ever been drawn for other health care providers.

Nursing home residents who do not die as a result of being moved from familiar surroundings and relationships frequently become depressed and disoriented and reduce their levels of activity. Bourestom and Tars, "Alterations in Life Patterns Following Nursing Home Relocation," *supra.* Passive behavior increases while involvement in meaningful activity decreases. Institute of Gerontology, University of Michigan-Wayne State University (Bourestom and Pastalan), "Relocation Report 2" 9 (1974). Psychological deterioration and serious physical illness may also become more pronounced. Miller and Lieberman, "The Relationship of Affect State and Adaptive Capacity to Reactions to Stress," 20 JOURNAL OF GERONTOLOGY 492, 494 (1965).

A recent review of relocation literature suggests the central role of the residents' perceived control or lack of control over transfer. Residents moved involuntarily without choice or control are more likely to be harmed by relocation than those who are allowed to exercise some degree of control. Schulz and Brenner, "Relocation of the Aged: A Review and Theoretical Analysis," 32 JOURNAL OF GERONTOLOGY 323, 332 (1977). The significance of psychological factors is highlighted by the finding that anticipation of relocation can have effects almost as severe as those caused by the transfer itself. Bourestom and Tars, "Alterations in Life Patterns Following Nursing Home Relocation," *supra.*

Finally, the degree of environmental change is a major factor in determining whether involuntary transfer is likely to increase mortality and morbidity. A moderate environmental change, requiring a move to a new facility but no change in staff and residents, is less life-threatening than a radical environmental change requiring new staff, new program of activities, new physical environment

and new resident population. Bourestom and Tars, "Alterations in Life Patterns Following Nursing Home Relocation," *supra.* Even relocation to a facility providing demonstrably better care and services than the former facility results in increased mortality and morbidity, a finding which underscores the dominant role of social and psychological factors in nursing home care. Aldrich and Mendhoff, "Relocation of the Aged and Disabled: A Mortality Study," *supra.*[13]

The pronounced and irreversible dangers of transfer trauma prompted the Administration on Aging in HEW to issue a Technical Assistance memorandum more than four years ago calling attention to the problem of involuntary relocation. The Memorandum (AoA-TA-75-1, February 19, 1975), advised:

> There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases in mortality far in excess of what would normally be expected have been documented.

Federal district courts presented with evidence concerning transfer trauma have uniformly been persuaded both of its existence and of its importance to involuntary transfer determinations. The district court in *Bracco v. Lackner,* 462 F.Supp. 436, 453 (N.D. Ca. 1978), for example, observed:

> The Department's action presents the specter of precipitous and involuntary mass transfer of plaintiffs from the Center to numerous other facilities scattered throughout the Greater Bay Area. Many patients would be separated from friends,

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[13] See Appendix 2 of the Brief of *Amici Curiae* Jill Harris and the Residents of Edgefield Manor for a full discussion of relocation literature.

family, and their personal physicians. The trauma that such a dislocation would cause many if not all the plaintiffs is well-documented . . . . The damage to individuals in terms of physical and emotional deteriorations, and increased mortality incidence as a result of "transfer trauma" has been recognized by the federal courts . . . .

There is no doubt that the relocation of plaintiffs will work a grievous loss upon them. Aside from the physical and emotional danger presented by the "transfer trauma" syndrome, the evidence shows that the plaintiffs will suffer a serious disruption in their personal lives.

See also Hathaway v. Mathews, 546 F.2d 227, 231 (7th Cir. 1976); *Roberson v. Wood*, 464 F.Supp. 983 (E.D. Ill. 1979); *Burchette v. Dumpson*, 387 F.Supp. 812, 819 (E.D. N.Y. 1974).

B.

Nursing Home Residents Have Liberty Interests in Continued Occupancy in the Nursing Homes Where They Reside.

Nursing home residents enjoy liberty interests in continued occupancy in their nursing homes which are protected under procedural due process.

The involuntary transfer of nursing home residents resulting from decertification deprives residents of several liberty interests, which this Court has variously identified as privacy, association and health. Loss of home, separation from family and friends, and risk to health and safety all deprive residents of values which are "fundamental" and "implicit in the concept of ordered liberty." *Roe v. Wade, supra*, 410 U.S. at 152.

It would be difficult to contend that nursing home patients do not have a strong interest in avoiding unnecessary transfers. Many of them have been uprooted from the communities in which they spent their working lives. For most of these patients, the limited world of the nursing home is the only community in which they retain a stable network of personal and social relationships. In addition, invalids and prospective invalids alike have a strong interest in avoiding the unnecessary physical hardship that could result from a mistaken transfer. These "home" and "health" interests, I submit, are among those that most persons would regard as being encompassed by the protections of the due process clause.

Town Court Nursing Center, Inc. v. Beal, supra, 586 F.2d at 289 (Adams, J., concurring).

A nursing home is more than a mere collection of unrelated individuals. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). It is a self-contained social structure and, for most residents, the exclusive and intimate environment where most of their personal and social relationships occur. Facility staff with whom residents relate on an intimate and daily basis often take the place of family and friends. These "emotional attachments that derive from the intimacy of daily association" are protected by the liberty interest in association. *Smith v. Organization of Foster Families, supra*, 431 U.S. at 844.

Relocation may also separate residents from ties with their community. For those residents with family and friends nearby, relocation to distant communities (an often unavoidable result of decertification) disrupts protected relationships and interferes with protected rights of association. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

Family, friends, and community groups visiting nursing home residents often assume advocacy roles with respect to quality of care and life in the facility. Such protective and supportive relationships between disadvantaged persons and specially skilled advocates have long been accorded constitutionally-protected status by the court as a right of association. *In re Primus*, 436 U.S. 410 (1977); *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1962).

The stress of abrupt separation from family, friends, and community may have permanent and disastrous effects on residents' mental and physical well-being. Decisions carrying such a risk of physical harm or death to an individual lie within the protected physician-patient relationship and are protected from interference by the patients' right to privacy. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade, supra*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The liberty clause of the due process clause includes the right to contract as well. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Nursing home residents have two separate contract interests protected by the liberty clause.

Most residents of nursing homes have contracts with the facilities in which they live. Indeed, many states now require admission contracts as a matter of state law.[14] Such contracts typically define the rights and responsibilities of both parties and incorporate by reference the

[14]See, for example, Maryland, COMAR 10.07.02.08A and Michigan, Mich. Stat. Ann. § 21766.

applicable federal and state law. Residents' personal contract rights are liberty interests protected under the due process clause.

Nursing home residents' second contract claim arises from their status as third party beneficiaries of the Medicaid provider agreement between the state and each participating nursing home.[15] *Roberson v. Wood, supra*; *Berry v. First Healthcare Corp.*, CCH Medicare-Medicaid Guide ¶ 28,693 (D.N.H., Oct. 26, 1977); *Fuzie v. Manor Care, Inc.*, 461 F.Supp. 689 (N.D. Ohio 1977).

Moreover, almost all Medicaid beneficiaries also pay directly for a portion of their nursing home care.[16] Some "categorically needy" nursing home residents are required to apply their personal income to the cost of their institutional care as a condition of receiving Medicaid.[17]

[15]All Medicaid providers must have contracts called provider agreements with the single state agency charged with the administration of the Medicaid program in order to receive Medicaid reimbursement. 42 C.F.R. §§ 442.10–442.30.

[16]More than 96% of all nursing home residents in 1973–74 who used Medicaid as the primary source of payment for their nursing home care used their own income or family support as a secondary source. CHARGES FOR CARE, p. 17.

[17]Coverage under Medical Assistance is required by law for persons who are "categorically needy"—those who are eligible for certain cash assistance government benefit programs. 42 U.S.C. § 1396a(a)(10)(A). Optionally categorically needy persons are either those people who would not be eligible for cash assistance benefits if they were not institutionalized, 42 C.F.R. § 435.722, or those people who would be eligible for cash assistance benefits if they were not institutionalized, 42 C.F.R. § 435.211. *See generally* 42 C.F.R. §§ 435.700–435.734, describing requirements for applying categorically needy institutionalized recipients' income to cost of care.

In addition, states are given a further option to provide coverage for "medically needy" persons. Medically needy people are those whose income is too high to allow them to qualify for categorical assistance programs but who are otherwise eligible for Medical Assistance. 42 U.S.C. § 1396a(a)(10)(C), 42 C.F.R. § 435.4.

42 C.F.R. §§ 435.700, 435.725. Under these eligibility provisions, Medicaid nursing home residents typically are allowed to keep $25 per month for personal needs; the remainder of their income is applied to the cost of their nursing home care. 42 C.F.R. §§ 435.700-435.740. Eligibility provisions for persons qualifying for Medical Assistance as "medically needy" are similar. Again, such persons are required to apply their personal income to the cost of their institutional care. 42 C.F.R. §§ 435.813, 435.815. Aside from the $25 per month which medically needy recipients may keep for personal needs, all income, from whatever source, is applied to the cost of institutionalization. *Friedman v. Berger*, 547 F.2d 724 (2d Cir. 1976). For both categorically needy and medically needy Medicaid beneficiaries, Medical Assistance pays the difference between the resident's income and the facility's Medicaid rate.

C.

Nursing Home Residents Have a Property Interest in Continued Occupancy in the Nursing Home Where They Reside.

The Third Circuit in both decisions below rested its finding of due process rights on nursing home residents' property interest in continued occupancy in their long-term care facility. The court first looked to the Medicaid statute and regulations as the possible source of property entitlements. Two provisions were found to create a protected property interest in continued occupancy: the free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), 42 C.F.R. § 431.51 [formerly 45 C.F.R. § 249.20]; and the section in the Patients' Bill of Rights prohibiting involuntary transfer of nursing home residents except for "medical reasons or for [their] welfare or that of other

patients, or for nonpayment for [their] stay," 42 C.F.R. § 442.311(c)(1)-(3) [formerly, 45 C.F.R. § 249.12(a)(1)(ii)(B)(4)]. These provisions, the Third Circuit reasoned, "create a legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer." 586 F.2d at 258.

While this decision was correct, two additional provisions of the Medical Assistance Program, as shown below, reinforce the court's conclusion that residents enjoy an entitlement to continued occupancy. Residents' property interests also derive from contract and from the "policies and practices" of the Medicaid program. *Perry v. Sindermann*, 408 U.S. 593 (1972).

One factor supporting a need for due process protection is the threatened loss of a benefit currently enjoyed. *Board of Regents v. Roth, supra*, 408 U.S. at 576. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, ___ U.S. ___, 99 S.Ct. 2100, 2105 (1979), reiterated the constitutional significance of the distinction between "'losing what one has and not getting what one wants.'"

Medicaid beneficiaries are not entitled to have their care paid for in an uncertified facility. As a result, residents whose facility may be decertified are threatened with being forced to move to a certified facility, if they want Medicaid to continue paying for their care.[18] Decertification necessarily requires the involuntary

[18] There is no real choice involved, since Medicaid beneficiaries are without the financial means to become private-pay residents at a decertified facility, even if they wanted to. Indeed, a facility which relies substantially on Medicaid for support of its residents may be forced to close, if decertified, forcing the involuntary transfer of Medicaid and private-pay residents alike.

transfer of Medicaid beneficiaries and demands that beneficiaries give up what they have: residence in a particular facility.

A second factor indicating the presence of protected property interests is the circumstances under which the particular benefit at issue can be terminated. If termination of the benefit is permissible only for cause, the beneficiary has protected property interests. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann, supra.* If, however, the benefit can be terminated at will and without cause, no due process rights apply. *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth, supra.* Most recently, the Court used this analysis of due process claims in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), a case challenging the utility's termination of services without affording its customers procedural protections. The utility there argued that since it may discontinue service for nonpayment of proper charges, due process does not apply. This Court was unpersuaded, noting that customers have a property interest in continued utility service when state law permits termination of service only "for cause." The factual dispute as to whether a utility bill is correct in amount is sufficient to create a protected property interest in consumers currently receiving utility service.

> Although the customer's right to continued service is conditioned upon payment of the charges properly due, "'[t]he Fourteenth Amendment's protection of "property" . . . has never been interpreted to safeguard only the rights of undisputed ownership.' [citing *Fuentes*] Because petitioners may terminate service only 'for cause,' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause.

436 U.S. at 11-12. Similarly, in this case, nursing homes' participation in Medicaid, like utilities' provision of service, can be terminated only "for cause." 42 C.F.R. § 442.12(d). Accordingly, nursing home residents, like utility customers, both the true beneficiaries of the service, have a protected property interest in ensuring that service is not terminated if proper "cause" for termination does not exist.

1. *Statutory entitlements to government benefits are property interests protected by procedural due process.*

The Due Process Clause of the Fifth Amendment protects interests in property which extend "well beyond actual ownership of real estate, chattels or money." *Board of Regents v. Roth, supra,* 408 U.S. at 572. This Court has long recognized that beneficiaries' interests in government entitlement programs—where statutory and administrative standards determine program eligibility—are protected by procedural due process. *Board of Regents v. Roth, supra,* 408 U.S. at 576; *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

In addition to the statutory provisions cited by the Third Circuit to support a protected property claim in continued occupancy, two other provisions create a statutory entitlement.

First, Medicaid law requires that the program be carried out in a manner ensuring the "best interests of the recipients." 42 U.S.C. § 1396a(a)(19). This provision requires that a state plan for medical assistance include:

> [S]uch safeguards as may be necessary to assure that eligibility for care and services under the plan

> will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of recipients.

See Coe v. Hooker, 406 F.Supp. 1072, 1081 (D.N.H. 1976); *American Medical Association v. Weinberger*, 395 F.Supp. 515 (N.D. Ill. 1975), *aff'd*, 522 F.2d 921 (7th Cir. 1975).

Second, nursing homes participating in the Medical Assistance Program can be decertified only for "good cause."

> If the medicaid agency has adequate documentation showing good cause, it may refuse to execute an agreement, or may cancel an agreement with a facility.

42 C.F.R. § 442.12(d). State agencies may not arbitrarily refuse or deny provider certification.

When Medicaid beneficiaries are guaranteed by law and regulation that they can choose to live at whatever certified nursing home they prefer; that they cannot be required to leave the nursing home except for certain specified reasons; that their facility will not be decertified except for "good cause"; and that the entire Medicaid program will be carried out in a manner ensuring their "best interests," they have a legitimate statutory expectation of continued occupancy in the nursing home where they live.[19]

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[19] *Moore v. Johnson*, 582 F.2d 1228 (9th Cir. 1978), cited with approval by both the State (20-21) and HEW (32-33), is simply not on point. *Moore* involved a challenge to the veterans' benefits statute, 38 U.S.C. §610, which authorizes the Administrator of the Veterans' Administration, in his discretion and "within the limits of the Veterans' Administration facilities" to "furnish . . . nursing home care which the Administrator determines is needed."

[footnote continued]

The State's and HEW's contention that no statutory property interest is at issue must fail because it misperceives the nature of the nursing home benefit.

a. The government benefit at issue in the nursing home context is continued residence at the particular nursing home where the resident lives.

Both the State and HEW argue that property interests are not at stake in this case because nursing home residents remain free to choose among qualified providers, whether or not the particular facility where they currently reside continues to participate in the Medical Assistance Program. (State 15; HEW 33.) This argument begs the question. Whether the particular facility where the resident lives satisfies Medicaid requirements is the issue to be determined in a decertification proceeding. Residents have a protected property interest in this

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No statutory entitlement to benefits is at stake. The VA law gives beneficiaries no choice of facility, no guarantee that they can be transferred only for good cause, no promise that facilities can be decertified only for cause and no requirement that the program be administered in recipients' "best interests"—all provisions of the Medicaid law here in issue. Whatever the merits of the *Moore* decision, it has no relevance to this case.

Caton Ridge Nursing Home, Inc. v. Califano, 447 F.Supp. 1222 (D. Md. 1978), *aff'd* No. 78-1290 (4th Cir., Feb. 26, 1979), CCH Medicare-Medicaid Guide ¶29,631, while on point, was wrongly decided. The decision is silent on issues of concern to residents, such as transfer trauma, disruption of residents' liberty interests in association, privacy and health, availability of alternative facilities, and quality of care. The absence of any discussion of these issues suggests that they may not have been raised. In *Caton Ridge*, residents were apparently represented jointly with the facility. The decision reinforces the Coalition's belief that residents' interests in decertification are not necessarily the same as the facility's interests. *See* pp. 28-34.

determination which is separate and distinct from their protected property interest in their own continued eligibility for benefits. *Klein v. Califano, supra,* 586 F.2d at 260 n. 16.

Residence at a nursing home as a Medicaid beneficiary bears little factual resemblance to receiving monetary aid under a cash assistance program. In a cash assistance program such as AFDC, the beneficiary is concerned with the dollar value of the benefits awarded, but has little interest in the actual form such benefits take. Whether the grant is paid in cash or through check is largely irrelevant to the cash assistance beneficiary; money is fungible.

The same cannot be said of the Medicaid nursing home benefit. The nursing home resident generally has no interest in the cost of the nursing home benefit paid by Medicaid, but substantial interest in the particular facility where the benefit is provided.

Medicaid reimbursement for nursing home services may vary dramatically between facilities in a single state, depending upon the reasonable cost-related formula which the state has chosen to adopt.[20] Two facilities providing the same level of care[21] may be reimbursed

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[20] Since 1976, HEW has required that nursing homes be reimbursed on a reasonable cost-related basis. 42 U.S.C. § 1396a(a)(13)(E). Within federally established guidelines, states are free to set their own reimbursement formulas. States may group providers into classes or may set rates on an individual facility basis. *See generally* 42 C.F.R. §§ 447.272-474.311, and 43 F.R. 4861, 4863 (Feb. 6, 1978).

[21] Level of care is a term of art in the Medicare and Medicaid programs relating generally to the intensity of services required by a nursing home resident. *Feld v. Berger,* 424 F.Supp. 1356, 1358 (S.D.N.Y. 1976).

at substantially different rates. For the nursing home Medicaid resident, however, the issue of reimbursement is largely irrelevant. The Medicaid beneficiary is generally required to contribute to the cost of his nursing home care by paying to the state all of his income except a $25 monthly personal needs allowance which he is permitted to retain. 42 C.F.R. §§ 435.700, 435.725, 435.813, 435.815. The state, through Medicaid, pays the difference between the beneficiary's personal contributions and the nursing home's state-determined Medicaid rate. Cost-of-living increases in government pensions, Social Security benefits, Railroad Retirement benefits or any other payments contributed by the beneficiary for his care are automatically given to the State, whose own portion of the nursing home rate is reduced accordingly. It is apparent that if a Medicaid nursing home beneficiary is transferred from a nursing home charging Medicaid $600 per month to a facility charging $700 per month, that $100 per month increase in cost holds little interest to the resident. His personal share in the costs remains constant. (*See* pp. 15-16.)

In sharp contrast to the resident's general lack of concern with Medicaid's reimbursement rate for his facility is his substantial concern with the particular facility where the care is provided. As demonstrated above (pp. 5-9), the nursing home becomes the actual and permanent home for its residents and the social environment where virtually all the residents' relationships and experiences occur. To alter this environment by moving the resident to another facility is to change in drastic and fundamental ways the nature of the benefit provided.

2. *Nursing home residents' contractual rights to continued occupancy in their nursing homes are property interests protected by procedural due process.*

As discussed above (pp. 14-16), nursing home residents have contract claims in the nursing home context, both as direct contractors for services and as third party beneficiaries of provider agreements between the states and facilities.

These contract claims are property interests protected under the due process clause. *Board of Regents v. Roth, supra*; *Perry v. Sindermann, supra.*

3. *Nursing home residents' reasonable and mutual expectations of continued occupancy in their nursing homes are property interests protected by procedural due process.*

"Policies and practices" not specifically rooted in either statute or contract may also give rise to property interests protected by procedural due process. *Perry v. Sindermann, supra,* 408 U.S. at 603. The relevant question is whether a "system in practice" creates an unwritten "common law" of nursing homes that residents will remain institutionalized without transfer. *Perry v. Sindermann, supra,* 408 U.S. at 602. Mutually explicit understandings, in the nature of an implied contract, create protected property interests. *Perry v. Sindermann, supra. See also Leis v. Flynt,* ___ U.S. ___, 99 S.Ct. 698 (1979).

There can be no dispute that elderly persons entering nursing homes generally expect to remain institutionalized for the rest of their lives. Few residents return to

the community to live once they enter long-term care facilities.

For Medicaid beneficiaries, the possibility of returning home is even more remote than for private-pay residents. Medicaid beneficiaries, almost by definition, have limited or no income or financial resources which would enable them to re-establish the homes or apartments they left to enter their nursing homes. Indeed, many residents sell their personal residences and deplete their assets paying for their nursing home care and turn to Medical Assistance only after their financial resources of a lifetime are exhausted. (*See* pp. 6-8.)

Residents' reasonable expectations that they will remain in the long-term care facility they have chosen are not unilateral. They are strongly reinforced and made explicitly mutual by state and federal practices. States and HEW rarely decertify long-term care facilities from participation in the Medicaid and Medicare programs, despite pervasive deficiencies.[22] The more common practice is requiring plans of correction. 42 C.F.R. § 442.251(b).

In 1974, for example, the Senate Special Committee on Aging reported that out of 7000 Medicaid skilled nursing homes, 4776 facilities with deficiencies were certified with six-month timetables for correction, while only 327 facilities were decertified by the states.[23] The

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[22] Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate,* 65 GEO.L.J. 691, 693-4 (1977); Comment, *Regulation of Nursing Homes—Adequate Protection for the Nation's Elderly?* 8 ST. MARY'S L.J. 309, 320 (1976); Regan, *Quality Assurance Systems in Nursing Homes,* 53 J.URB.L. 153, 180-85 (1975).

[23] FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, p. 104.

federal record with respect to Medicare is no different. In 1971, HEW stated that the agency had decertified only about 100 Medicare skilled nursing facilities—a mere 1.5% of the total.[24] The rare enforcement activities that result in decertification establish a nursing home system "in practice" which only rarely requires the transfer of residents and which creates expectations in residents that they will be able to remain in the facilities they choose.[25]

II.

THE INVOLUNTARY TRANSFER INEVITABLY RESULTING FROM DECERTIFICATION OF A NURSING HOME CONSTITUTES A REDUCTION IN MEDICAID BENEFITS WHICH ENTITLES RESIDENTS TO NOTICE AND HEARING RIGHTS PROVIDED UNDER FEDERAL REGULATION.

As demonstrated above (pp. 21-23), the government benefit at issue in the nursing home context is continued residence at a particular facility. In light of the phenomenon of transfer trauma and the irrevocable destruction of associational, health and contractual interests which

[24] FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, p. 104.

[25] Decertification is a grossly inadequate enforcement device. The sanction has such significant implications for residents and facilities that it is infrequently used. State agencies are understandably hesitant to use the drastic sanction, fully aware that the Medicaid bed shortage may mean there is no place to move residents whose facility is closed. The result is that many facilities continue operating with serious deficiencies. A variety of more flexible enforcement mechanisms such as citation systems and receiverships (*see* n.31 at pp. 31-2) would more likely succeed in bringing about the goals of regulation: higher quality of care and life residents. *See* Brown, *An Appraisal of the Nursing Home Enforcement Process, supra.*

involuntary transfer causes, any change in residence is a clear factual reduction in benefits which entitles beneficiaries to the administrative rights to timely notice and opportunity for hearing. 45 C.F.R. § 205.10(a)(5). *Bracco v. Lackner, supra,* 462 F.Supp. at 453. The district court in *Klein v. Mathews* aptly described how involuntary transfer results in reduction of benefits in fact:

> . . . to cause the recipient to suffer the grievous loss attendant to transfer is to reduce the benefits to which the recipient would otherwise be entitled. The involuntary transfer of Medicaid patients is simply not a cost free decision. While it may be argued that a mere change in the form of delivery of governmental benefits may not work a reduction, e.g., payment of benefits by check or by cash, it would be a callous disregard of the real life consequences to say that a Medicaid patient who suffers transfer trauma is receiving the same benefits under Title XIX as a patient not forced to similarly suffer. While cash and checks may be functional equivalents, the benefits available to involuntarily transferred patients and those not transferred are not. The trauma associated with transfer and the losses suffered as a result of transfer are tantamount to a reduction of benefits. Such reduction triggers procedural due process protections.

430 F.Supp. 1005, 1010 (D.N.J. 1977). Changing the form of the Medicaid nursing home benefit changes the benefit itself. There can be no question Medicaid nursing home benefits are reduced if transfer occurs. Under these circumstances, federal regulations require notice

and an opportunity to be heard before benefits may be reduced.[26] 45 C.F.R. § 205.10(a)(5).

III.

NURSING HOMES CANNOT REASONABLY BE EXPECTED TO RAISE ALL ISSUES OF CONCERN TO RESIDENTS IN A DECERTIFICATION PROCEEDING.

Both the State and HEW argue that nursing homes can reasonably be expected to raise all issues that might have a bearing on the decertification proceeding. The State contends, "[I]t is entirely reasonable to assume that the operator of the nursing home will bring all the relevant information to bear on the question [of decertification] in order to protect his investment." (State 19.) HEW concurs in this view. (HEW 40.) These arguments ignore the realities of the Medicaid nursing home program.

[26] Indeed decertification of a facility may actually result in "discontinuance or termination" of Medical Assistance if alternative Medicaid beds are not found for the residents who must be moved. *Bracco v. Lackner, supra,* 462 F.Supp. at 444. The common discrimination against Medicaid recipients and the general unavailability of Medicaid placements make this possibility a serious concern. Decertification of deficient facilities may in fact be delayed because of the lack of sufficient alternative placements. *Klein v. Califano, supra,* 586 F.2d at 253. Certainly if facilities are decertified and Medicaid beds are not provided to displaced residents, the result is the discontinuance or termination of Medical Assistance to Medicaid beneficiaries. Federal regulations, under such circumstances, require prior notice and hearing. 45 C.F.R. § 205.10(a)(5).

A.

Nursing Homes May Choose Not To Oppose Their Decertification from the Medicaid Program.

The State's and HEW's contention is based on the assumption that nursing homes will oppose their decertification from the Medical Assistance program in all instances where residents would similarly oppose decertification. Such is not the case.

The decision to participate in the Medical Assistance program in the first instance or to contest a decertification effort by the state or HEW rests solely with the facility.[27] Given the proprietary status of the nursing home industry in the United States,[28] the decision is often a financial one. It must be noted that Medicaid generally reimburses providers at a lower rate than private-pay residents pay (and, by law, Medicaid cannot pay a higher rate).[29] Facilities, as a result, often see a financial benefit in discriminating against Medicaid

[27] Participation in the Medicaid program is the voluntary decision of providers. *Briarcliff Haven, Inc. Department of Human Resources of the State of Georgia,* 403 F.Supp. 1355, 1364 (N.D. Ga. 1975) (". . . Briarcliff is not required to participate in the Georgia Medicaid program, such a decision is completely voluntary on the part of the provider. If Briarcliff does elect to participate in the program it may terminate participation at any time and for any reason.")

[28] More than three-quarters of the country's 23,000 facilities, containing more than two-thirds of the country's nursing home beds, are operated on a for-profit basis. FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, p. 22.

[29] The upper limit for Medicaid reimbursement to skilled nursing and intermediate care facilities is "the provider's customary charge." 42 C.F.R. § 447.315(a). States may reimburse facilities at a lower rate. *Briarcliff Haven, Inc., supra,* 403 F.Supp. at 1362.

beneficiaries. Indeed facilities frequently participate in the Medicaid program when they first open for business—in order to establish a reputation in the community and to develop a good cash flow with guaranteed Medicaid income—only to withdraw from participation when financial considerations change. *Roberson v. Wood, supra*; *Stitt v. Manor Care, Inc.*, CCH Medicare-Medicaid Guide ¶ 29,409 (N.D. Ohio, Oct. 24, 1978). Other facilities which have few Medicaid-supported residents or which rely on Medicaid for only a small portion of their income may voluntarily decide to withdraw from program participation or not actively to resist decertification.

The all-too-common discrimination against Medicaid beneficiaries that pervades much of the nursing home industry[30] belies the State's and HEW's claim that nursing homes threatened with decertification will necessarily oppose decertification vigorously.

B.

The Interests of Nursing Home Residents and Nursing Home Facilities Are Not Necessarily Synonymous.

Even if nursing homes faced with decertification from Medicaid forcefully contest their decertification, the interests of residents and facilities in such circumstances will not necessarily be synonymous. As demonstrated above (pp. 29-30), facilities may be reluctant to present certain types of evidence—for example, on the issue of

[30] *See*, for example, *Pennsylvania Nursing Home Ombudsman Project Final Report: The Pennsylvania Experience* (January, 1979); Ohio General Assembly Nursing Home Commission, *A Program in Crisis* (Interim Report, June, 1978), p. 8.

transfer trauma—because of concern that such evidence will return to haunt them if they later attempt to discharge a particular resident. Crucial evidence relevant to resident concerns may simply not be placed before the administrative agency.

On issues of remedy, residents' and facilities' interests may most clearly diverge. Residents may want to argue that a plan of correction should be required to remedy a defect, 42 C.F.R. §§ 442.101(d)(2), 442.105(b), 442.202(c), 442.253(a), while facilities may prefer to urge waiver of the requirement altogether, 42 C.F.R. §§ 442.101(d)(1), 442.202(c), 442.253(a). Or residents may want to suggest to the state enforcement agency that it use a remedy other than decertification to correct a problem and affirmatively bring the facility into compliance. For example, under the recently enacted Michigan nursing home reform law, Public Law 493 (Dec. 6, 1978), the state may issue citations for civil penalties or place a deficient facility in receivership if the facility fails to comply with nursing home laws.[31] Deficient facilities

[31] Nursing home citation and civil penalty systems have been enacted in Alaska (Alaska Stat. §§ 8.70.160 and 8.70.170); California (Health and Safety Code §§ 1417-1431) (West); Connecticut (Conn. Gen. Stat. §§ 19-607-613, 19-620); Florida (Fla. Stat. § 400.12); Iowa (Iowa Code 135C.36-135C.48); Kansas (Kan. Stat. § 39-923 (Supp. 1977)); Kentucky (Ky. Rev. Stat. § 338.991); Michigan (Mich. Comp. Laws § 217998); Minnesota (Minn. Stat. § 144A.10); New Jersey (N.J. Rev. Stat. §§ 26: 2H-13-26:2H-16); North Dakota (N.D. Cent. Code § 23-16-06); Oregon (Or. Rev. Stat. §§ 441.705-441.745); Washington (Senate Bills Nos. 2337, 2338); West Virginia (W.Va. Code §§ 16-5C-5, 16-5C-10); Wisconsin (Wis. Stat. §§ 50.04(4), (5)).

Nursing home receivership laws have been enacted in Connecticut (Conn. Gen. Stat. Ann. § 19-621a (1979) (West)); Kansas (Kans. Sess. Laws, Ch. 162); Michigan (Mich. Stat. Ann. § 16614 (13) (Supp. 1979) (West); Minnesota (Minn. Stat. Ann. § 144A.15

[footnote continued]

would be unlikely to suggest to the state agency that it use such alternative enforcement mechanisms. Finally, nursing home residents may agree with the state agency that closing a facility is appropriate and necessary, and may want to appear solely for purposes of ensuring that the resulting transfers are carefully and properly carried out. Again, facilities could be expected to have little interest in this issue of vital concern to residents.

In short, the interests of residents and facilities are not in all instances the same. Residents cannot reasonably be expected to rely on facilities to present their interests fully and forcefully.

Indeed, in this case, the district court ordered separate counsel for the residents when Town Court's attorneys filed suit and sought to represent both the facility and the residents.

This Court, too, has been sensitive to the unique interests of persons that make their independent representation essential. *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), involved the right of union members to intervene in a lawsuit filed by the Secretary of Labor to set aside an election of union officers for violation of the Labor-Management Reporting and Disclosure Act. LMRDA makes civil suits by the Secretary the exclusive post-election remedy for violations of Title IV of the Act. 29 U.S.C. § 483. Union members whose complaint to the Secretary initiated the enforcement procedure that led to the lawsuit sought to intervene in the Secretary's case, pursuant to Rule 24(a)

(Supp. 1979) (West)); Missouri (Senate Bills Nos. 328, 432, 35 and 419 (passed May, 1979)); New Jersey (N.J. Rev. Stat. §§26: 2H-37 *et seq.*) (Supp. 1978); New York (N.Y. Public Health Law, Art. 28-A, 2862); Wisconsin (Wis. Stat. Ann. § 50.05) (West).

Fed. R. Civ. P. This Court held that union members have that right, firmly rejected the Secretary's assertion that he adequately represented the union members' interests. Although the Secretary of Labor becomes the union members' "lawyer" for purposes of enforcing rights against the union in any action to set aside a union election, the Court recognized that members may "have a valid complaint about the performance" of their "lawyer." And at the remedy stage of such enforcement litigation, the Court observed, intervenors may properly assist the Court in devising a suitable order. 404 U.S. at 537 n. 8.

The right of nursing home residents to independent representation is even more pronounced. Certainly the facility's attorneys are not by law representing the interests of residents, as the Secretary of Labor represents union members in an election case. Moreover, residents, like union members, may file the initial complaints with the state agency that lead to the enforcement (i.e., decertification) proceeding. To exclude residents from the enforcement activity that follows their complaints deprives them of the opportunity to propose appropriate corrective action.

The need for genuinely independent counsel for nursing home residents cannot be denied.

C.

Residents' Legitimate Concerns in the Decertification Proceeding Are Their Own Interests and Not the Vicarious Assertion of Nursing Homes' Interests.

One of HEW's persistent themes in its brief is that decertification affects nursing home residents only tangentially and that the real interests at issue are those of long-term care providers. (HEW 29-32.) HEW flatly asserts that residents are trying vicariously to assert the rights of nursing homes by claiming procedural rights in decertification proceedings. This contention is without merit and mischaracterizes the Medicaid program.

Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, was enacted by Congress in 1965 in order "to enable each state to furnish medical assistance to aged and disabled persons whose income and resources are insufficient to meet the necessary costs of necessary medical services." *Bracco v. Lackner, supra,* 462 F.Supp. at 451. *See also Yanez v. Jones,* 361 F.Supp. 701 (D. Utah 1973).

Beneficiaries are not superfluous to the Medicaid program; they are the sole reason for its enactment and continued existence. The financial benefits received by providers for participating in Medicaid, while substantial, do not convert Medicaid into a program whose purpose is serving providers. It is the recipients of medical care and services who are the third party beneficiaries of the Medicaid program. *Roberson v. Wood, supra*; *Berry v. First Healthcare Corp., supra*; *Fuzie v. Manor Care, Inc., supra.*

Residents' interests in the decertification of their facilities are significant personal concerns.

IV.

ONLY A PRE-DECERTIFICATION EVIDENTIARY HEARING CAN ADEQUATELY PROTECT THE DUE-PROCESS INTERESTS OF NURSING HOME RESIDENTS.[32]

Before a person can be constitutionally deprived of an interest protected by the due process clause, some form of hearing is required. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). The specific form such hearing must take depends upon analysis of the private and public interests at stake. This court in *Eldridge* identified three distinct factors that determine the nature of the required hearing. Each factor supports the nursing home residents' claim that only a pre-decertification evidentiary hearing can adequately protect their significant due process interests.

A.

Nursing Home Residents' Interests in Continued Occupancy Are Fundamental Human Rights.

The first factor in the equation is "the private interest that will be affected by the official action." *Mathews v. Eldridge, supra,* 424 U.S. at 335. As demonstrated,

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[32] Since the Court below remanded the case for a determination of the procedures necessary to satisfy the due process interests of nursing home residents, 586 F.2d at 283, the type of due process hearing which nursing home residents may be entitled to in a decertification proceeding is not actually before the Court in this case. However, both the state and HEW raised the issue in their briefs and the Court below alluded to the issue in the companion case, *Klein v. Califano, supra,* 586 F.2d at 261 and n.19. *Amicus* therefore addresses this issue briefly here, urging a finding that only a pre-decertification evidentiary hearing like that approved in *Goldberg v. Kelly, supra,* can satisfy the due process interests of nursing home residents.

nursing home residents' interests in continued occupancy in their homes touch upon the most fundamental of human rights.

Most basic of all is the right to life itself. Decertification of a long-term care facility necessarily demands the transfer of its Medicaid beneficiaries. That transfer may be life-threatening. Transfer trauma places residents' lives at direct and substantial risks and severely undermines their health.

Involuntary transfer of residents from a decertified facility also disrupts the fragile network of relationships that form within facilities between residents and staff. Liberty interests in association and privacy are damaged.

Finally, residents' statutory, contractual and mutually expectational property interests in remaining in their chosen homes are destroyed by decertification.

Deprivations of these dimensions cannot be cured by later administrative action. No post-termination remedy can restore life or recreate human relationships that are severed. *Contrast Mathews v. Eldridge, supra,* 424 U.S. at 340. Indeed, there is no post-decertification administrative remedy that residents can even invoke under the Medicaid law. *Klein v. Mathews, supra,* 430 F.Supp. at 1007. Thus, deprivations of these fundamental human rights become permanent, complete, and irrevocable. *Compare Goldberg v. Kelly,* 397 U.S. 254 (1970).

B.

Nursing Home Residents Can Contribute Substantially to the Questions at Issue in a Decertification Proceeding and Thereby Increase the Correctness and Reliability of the Administrative Decision.

Nursing home residents can contribute substantially to the resolution of issues presented in a decertification proceeding. Their full and active participation can help assure that the administrative decision is correctly made.

First, nursing home residents can secure expert testimony on technical questions at issue in decertification. On issues where technical expertise is required, there is no reason why nursing homes alone are capable of presenting that testimony. Residents, through counsel, can similarly contract with experts to testify on technical matters. Residents have done so. *Bracco v. Lackner, supra.*

Moreover, certain issues that are relevant to a decertification proceeding may not be adequately explored unless raised by the residents themselves. Prominent among these issues is transfer trauma. (*See* pp. 9-12.) Facilities may not want to stress too forcefully the adverse consequences of involuntary transfer because of their own frequent interest in transferring particular residents. When facilities discriminate against Medicaid recipients, for example, and demand the removal of a resident who has exhausted his personal financial resources, they may prefer not to be reminded that in another context—when they were faced with decertification—they argued that involuntary transfer is harmful.

There can simply be no question that the administrative determination to certify or not to certify a particular facility is a discretionary decision, based on the careful

balancing of factors related to adequate resident care. Indeed, the state agency is explicitly given authority to certify a facility with deficiencies if the deficiencies "do not jeopardize the patient's health and safety, nor seriously limit the facility's capacity to give adequate care." 42 C.F.R. § 442.105(a). (*See generally* 42 C.F.R. § 442.105, "Certification with deficiencies: General provisions.") The discretionary nature of the administrative decision makes plain that the state agency must decide whether the decertification of a deficient facility is less or more harmful for the facility's residents than certification. Only a full exploration of the residents' varied interests, presented from the residents' point of view, can help the state agency properly reach its determination about residents' "best interests." As demonstrated, the facility is not likely to present these questions adequately.

The second area where residents can substantially contribute to the reliability and correctness of the administrative decision is through direct testimony on quality of care and quality of life issues. Whether a facility with deficiencies can continue to provide adequate resident care is the issue to be decided by the state agency in the decertification proceeding. Residents can contribute relevant evidence on this issue, either personally or through family, friends and other advocates. Certainly residents who have first-hand experience with the facility's daily functioning are in an obvious position to testify about conditions and the care given. As the district judge observed in *Klein v. Mathews, supra,* 430 F.Supp. at 1011.

> While the court is deferential to the expertise of HEW, it is rank paternalism to suggest that patients who live in a facility, who have firsthand knowledge of the conditions, who are best equipped to describe how the facility has served them, cannot contribute to the process by which it is determined whether the facility meets federal standards. The court finds it hard to understand how HEW can seriously argue that the very patients whom HEW seeks to protect can have no purposeful role with respect to the condition of their environment.

See also Bracco v. Lackner, supra.

Finally, the mere fact of participation in the decertification decision-making process can have a substantially positive effect on residents' health and well-being. Social science research has documented that loss of control over their environment contributes to nursing home residents' psychological and physical deterioration. Mercer and Kane, "Hopelessness and Helplessness Among the Institutionalized Aged: An Experiment," 4 *Health and Social Work* 91 (Feb., 1979). An affirmation that residents can contribute in a meaningful way to decisions about their lives and environment will ensure that the Medicaid program is carried out in a manner promoting beneficiaries' health, welfare and "best interests."

Existing decertification procedures call on residents in only limited and inconsequential ways, if at all (HEW 37). The procedures fail to ensure full exploration of all relevant factors in the decertification determination, including use of alternative remedies not requiring transfer. The correctness of the administrative decision would be substantially enhanced by the participation of residents and their advocates.

C.

The Public Interest Is Furthered by Giving Nursing Home Residents a Pre-decertification Evidentiary Hearing.

The final factor to be balanced is the Government's interest, including the fiscal and administrative burdens which additional procedures would require. *Mathews v. Eldridge, supra,* 424 U.S. at 335, 347.

There can be no question that involvement of residents in decertification determinations would create little administrative burden, in light of the comparatively few facilities nationwide which are faced with formal decertification.[33] *See* pp. 25-26.

[33]Both the State and HEW suggest that a decision by this Court granting nursing home residents the procedural rights sought in this lawsuit would open the floodgates to unlimited litigation asserting procedural claims. The state speculates that Medicaid beneficiaries would seek hearings on whether physicians could be excluded from the Medicaid program. (State 15, 18.) HEW raises the specter of employees of government contractors asserting procedural rights when their employers' contracts are cancelled or not renewed (HEW 30).

As shown above (pp. 5-9), nursing homes are qualitatively different from other Medicaid providers. They are substitute homes for their residents, providing for the residents' medical, social, psychological, and spiritual needs on a long-term, permanent basis. A physician who provides even long-term medical attention is simply not in a position at all comparable to a total care community.

HEW's fearful analogy to government contractors is even less on point. The Medicaid program, as discussed above (p. 34), was enacted for the sole Congressional purpose of providing medical and health care for poor people. Government defense contracts, in contrast, while undeniably providing employment for individuals, have as their purpose the production of equipment necessary to the national defense. Any benefits to the contractors' employees are incidental to the contracts' primary purposes; such employees are certainly not the intended or third-party beneficiaries of the contracts.

HEW's intention to explore increased resident participation in decertification and termination proceedings (HEW 17, 37) recognizes the importance of resident involvement in these determinations and belies any assertion that such involvement is administratively burdensome. Indeed, the State of Maryland at the present time gives residents explicit notice of decertification determinations and advises them of their rights of appeal.

Finally, the Government, and the public at large, have a substantial interest in ensuring that government benefit programs are not implemented in a manner that is harmful to beneficiaries. *Goldberg v. Kelly, supra,* 397 U.S. at 264-5. The orderly operation of government programs is a fundamental concern to the public and program beneficiaries alike. Ensuring that decertification decisions are based on a careful balancing of all relevant factors, with affected persons guaranteed the right to be heard, is in the public interest.

CONCLUSION

For all of the reasons outlined above, *amicus* urges affirmance of the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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August 15, 1979